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IN MEMORY OF

JUDGE DOUGLASS BOARDMAN

FIRST DEAN OF THE SCHOOL

By his Wife and Daughter

A. M. BOARDMAN and ELLEN D. WILLIAMS

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REPORTS OF CASES

IN

BANKRUPTCY.

(Before Mr. Commissioner SHEPHERD.)

1849.

Re KELLICK.

Saturday,
Sept. 22nd.

89
THE bankrupt came up on his last examination.

Linklater, solicitor for the assignees, opposed.

The bankrupt was examined at considerable length, for the purpose of making it appear that he had contracted certain debts by fraud, and that he had given undue preference to certain creditors.

The official assignee reported favourably on the balance-sheet, and there was no objection to the accounts rendered.

The question then arose as to whether the Court can compel a bankrupt to swear to the truth of his balance-sheet.

Lawrence, for the bankrupt.—This question arises upon the construction of the 160th and 260th sections of the new Act. The first of these sections directs, among other things, that “the bankrupt shall make oath of the truth of such balance-sheet and accounts, whenever he shall be duly required by the Court so to do;” but there is no power given to the

Balance-sheet ;
Bankrupt's
oath ; Power of
commitment ;
Penal clauses ;
Protection ;
Notice.

Quære—Is a
bankrupt com-
pelled to make
oath as to the
statements in
his balance-
sheet when he
comes up for
his last exami-
nation ?

The penal
clauses in the
Bankrupt Law
Consolidation
Act are pro-
spective when
the accounts
are passed.

The Court is
not compelled
by the Act to
refuse protec-
tion on the

ground that the bankrupt has committed offences under the Act.

The bankrupt ought to have notice of an intention to oppose his passing the last examination, when the opposition is in respect of alleged offences under the statute.

1849.

Re KELLICK.

Court to compel the bankrupt to make such oath. The power of commitment is given by the 260th section, which directs that if any bankrupt, or the wife of any bankrupt, shall refuse to sign the declaration contained in the Schedule W to this Act annexed, &c. (the form of declaration substituted for the bankrupt's oath), it shall be lawful for the Court, by warrant, to commit such bankrupt, &c. in London, to the Queen's prison, there to remain, without bail, until he shall submit himself to be sworn, &c. The former section gives no power of commitment if the bankrupt shall refuse to be sworn, and the latter gives such power only when the bankrupt refuses to sign the declaration, so that it becomes a question whether the Court can require him to make such oath until he shall have been committed under the latter section, and have submitted, as there required. There is this difficulty as to the form of the warrant of commitment, that it will direct that the bankrupt shall be kept in custody for refusing to make a declaration, and be detained until he shall submit to be sworn; the effect of which would be, that the bankrupt would be committed for one thing, and detained until he should do another, which he was not required to do at the time of his committal. I conceive that a warrant so inconsistent with itself would be bad.

By the COURT.—All I can do is to continue the old practice, and require the bankrupt to make the declaration.

The bankrupt then, by the advice of his solicitor, consented to be sworn.

Linklater, solicitor for the assignees.—I have established by evidence a case of fraud and undue preference against the bankrupt: these are two of the offences named in the 256th section of the Bankrupt Law Consolidation Act; under that section the Court, even if disposed to pass the accounts, must refuse protection.

Lawrence, for the bankrupt.—This is a meeting solely for the purpose of looking into the accounts. The conduct of the bankrupt will be brought before the Court at the certificate-meeting. No objection has been taken to the balance-sheet, the accounts must pass, and the bankrupt is entitled to protection. These charges now brought against him are now, for the first time, penal in their consequences. The assignees ought to have given such notice as would have enabled us to meet them. We are taken by surprise. The Act must be considered prospective; and the conduct complained of took place before it came into operation. It can never be contended that the legislature intended to create new penal offences *ex post facto*.

1849.

Re KELLICK.

Mr. Commissioner SHEPHERD.—I never can think that this Act was intended to operate *ex post facto* on the offences created by it. This case is by no means clear. The bankrupt should have the benefit of the doubt; and, as I see no reason why his accounts should not pass, I will grant him protection till the day of the certificate. I may add, that when it is intended to bring charges with penal consequences against a bankrupt at the last examination, he ought to have notice, so as to enable him to meet such charges.

(Before Mr. Commissioner GOULBURN.)

*Re EDWARDS.**Friday,
October 19th.*

CATLIN, solicitor, applied in this case for the discharge of the debtor out of custody on his petition, proposing a private

Discharge;
Practice.
The Commissioner is em-

powered to discharge a debtor out of custody on his petition, proposing a private arrangement with his creditors, upon his compliance with the provisions of the statute, and upon such terms as the Commissioner shall deem meet.

Where the debtor offered to give up 200*l.* to his creditors, his discharge was ordered on payment of the money.

But it being objected that the debtor could not raise that sum immediately,

It was ordered, that he should have protection against all but the detaining creditor, but that a discharge would not be granted until the money was deposited, or security given.

1849.

Re EDWARDS.

arrangement with his creditors, under the statute, (a) which provides that, on such a petition being filed, the Commissioner may grant protection, the debtor being bound to file a schedule of his estate and effects with the official assignee; after which a private meeting of the creditors is to be called, fourteen days' notice thereof being given. The question in this case was, whether a defendant in custody was entitled to his discharge from the suit of the detaining creditor.

His HONOUR, after a long argument, held that the Commissioners had such a power under certain circumstances. As the debtor in this case offered to give up 200*l.* his discharge would be granted on his doing so.

Catlin said that could not be done at the moment, as it was money to be advanced to him, that he might make a proposition to his creditors. He did not consider that the debtor could be called upon to give up his property until after he had handed in his schedule; but if he failed in attending the meeting, or complying with the undertaking he had made, he might be treated in the same manner as though he had been made a bankrupt.

His HONOUR said, that general protection was only to be given when the debtor was at liberty; but when in custody, the Court had power to affix conditions to the discharge. His Honour, in this case, said he would grant protection against all other parties than the detaining creditor; and on the schedule being filed, a meeting would be appointed, but no discharge would issue unless the money was deposited or bail given.

(a) Bankrupt Law Consolidation Act, 1849, sec. 211 *et seq.*

Whenever in the following pages the word "Act" or "Statute" oc-

curs, the Bankrupt Law Consolidation Act, 1849, stat. 12 & 13 Vict. c. 106, is referred to, unless the contrary is expressed.

1849.

ANONYMOUS. (a)

*Saturday,
October 20th.*

A TRADER debtor was summoned under the 78th section of the Bankrupt Law Consolidation Act, accompanied with notice requiring immediate payment of the sum of 70*l*. The debtor admitted part of the demand, viz. 5*l*. but made the necessary deposition that he verily believed that he had a good defence, upon merits, to the remaining and larger part of the demand against the trader debtor.

An action of a debt against the trader debtor was then pending for the amount claimed by the summoning creditor. An application was made on behalf of the summoning creditor, that the trader debtor should be ordered to enter into the bond required under the 79th section of the Act, and that the Court would be pleased to make an order as to the form and nature of the bond.

It was contended, on the other side, that the last-named section did not make it compulsory upon the Court to order such a bond to be entered into, and that this was a case in which it might be dispensed with.

Mr. Commissioner GOULBURN.—The section is imperative as to the bond ; and, until proper rules and orders are framed under the new Act, I feel it incumbent on me to adhere to the old practice as far as circumstances will allow. I shall therefore decide in conformity with the orders drawn up by my brother Holroyd, which have hitherto been followed by the Court in cases similar to that now before me. I therefore order that the trader debtor shall, within eight days, enter into a bond with two sureties in the penal sum of 150*l*., and that he shall give the summoning creditor twenty-four hours'

Summons to
trader debtor ;
Admission of
part of de-
mand ; Bond ;
Practice.

Where a
trader debtor,
summoned un-
der the 78th
section of the
Act, appears,
and admits part
of the demand
in the manner
required by
section 79, but
at the same
time deposes
that he believes
he has a good
defence on me-
rits to the re-
maining and
greater part of
the demand,
the Court will
require him to
enter into a
bond to secure
the whole de-
mand.

(a) In all cases previous to adjudication, it is our intention, for obvious reasons, not to publish the

names of the parties. But see inf. p. 25.

1849.

ANONYMOUS.

notice of the proposed sureties, if they reside in London, and two clear days, or such further notice as may be necessary, if they reside in the country.

ANONYMOUS.

Adjudication upon the petition of a trader debtor; Practice.

The Court will require to be satisfied by other evidence than the petitioner's affidavit that he had sufficient assets under the provisions of the 89th section.

A TRADER alleged to be subject to the Bankrupt Laws presented a petition to be adjudicated a bankrupt, with an affidavit annexed, that he had assets sufficient to pay his creditors five shillings in the pound in such form as required by sec. 89 of the Bankrupt Law Consolidation Act.

It was contended, on the part of the petitioner, that the affidavit was sufficient to satisfy the Court of the bankrupt's ability to pay five shillings in the pound, and that he should forthwith be declared a bankrupt.

Mr. Commissioner GOULBURN.—I am clearly of opinion that this affidavit is not sufficient to support an adjudication. I must be satisfied of the facts contained in it by other evidence than the petitioner's own affidavit. I shall hear such evidence as you may be able to produce, in private.

Re PETIT.

Evidence.

The bankrupt has a right to cross-examine a creditor upon his proof of debt.

THIS was a disputed proof. The creditor was examined in support of his proof, and was cross-examined by the solicitor for the assignees.

The bankrupt's solicitor was proceeding to a further cross-examination, when the solicitor for the proof objected.

By the COURT.—The bankrupt has a right to cross-examine as to a proof, more particularly as, under the new statute, debts proved under a bankruptcy may have the force of judgment debts.

1849.

(Before Mr. Commissioner EVANS.)

ANONYMOUS.

*Tuesday,
October 23rd.*

A PETITION was presented, praying that a trader is within the meaning of the Bankrupt Law Consolidation Act. It did not appear that such trader had carried on any business for a period of six months previous to the date of the petition, in any of the districts of the Court of Bankruptcy; but it did appear that he had resided for a longer period previous to the date of the petition within the London district.

District in which petition for adjudication against a trader shall be prosecuted; Bankrupt Law Consolidation Act, ss. 65 & 90; Construction.

To support a petition for adjudication against a trader liable to become bankrupt, it is not necessary that such trader shall have carried on business for six months in any district, provided he shall have resided in such district for an equal period.

Hubbard, solicitor, in support of the petition.—A difficulty arises on the construction of the 65th, 89th, and 90th sections of the Act. Sec. 65 declares what shall be a trading, so as to make the person carrying it on liable to become a bankrupt. But nothing is said as to the period for which such trading shall have been carried on previous to a petition for adjudication being presented. Sec. 89 enacts that proceedings to obtain adjudication in bankruptcy shall be by petition in the form specified in Schedule M to the Act annexed, &c. The form contained in the schedule is as follows:—"The humble petition sheweth, &c. that——— being a trader, and having resided (or carried on business, as the case may be) for six calendar months immediately preceding the date of this petition," &c. So that the schedule differs from the enacting part of the statute in a matter of form; where such a variance exists, the enacting part must prevail. (*Reg. v. The Magistrates of Harwich*, Q.B. Hilary Term, 1849.) The 90th section gives the Senior Commissioner of this Court power, whenever he may deem it expedient, to order any petition to be prosecuted in any district, with or without reference to the district in which the trader shall have resided or carried on business. There is

1849.

ANONYMOUS.

some doubt as to the construction of this part of the Act, but I submit that this is a case in which your Honour will exercise the powers vested in you by the last-mentioned section.

Mr. Commissioner EVANS.—All doubts are cleared up by the words of sec. 90,—“shall have resided or carried on business.” The petition may be proceeded with in this court. (*Vide infra, Re Irwin*, p. 27.)

(Before Mr. Commissioner SHEPHERD.)

Re JOHN PYM.

Practice; Arrangement between debtor and creditors.

In the case of a petition under the clauses for arrangements between debtors and creditors, the Court cannot discharge the debtor without having produced before it examined copies of the judgments or records in the actions in respect of which the creditor was detained, and an affidavit by the debtor that he had not contracted the debt or debts by fraud.

THIS was a petition under the clauses in the new Act for arrangements between debtors and creditors under the control of the Court.

Linklater appeared as solicitor for the debtor, and

Roxburgh counsel for one of the detaining creditors.

Linklater, solicitor, applied to have the case taken in private, the sittings contemplated by the Act being private sittings.

Mr. Commissioner SHEPHERD.—The present sitting is not within the meaning of the Act; and the meeting was accordingly proceeded with in public.

Linklater then stated that the Commissioner having refused to issue a warrant to have the debtor brought up at this sitting, on the ground that the Act conferred no jurisdiction for that purpose, the debtor was not in attendance.

Roxburgh objected to the hearing of the application in the absence of the debtor; but

Linklater contended that his presence was unnecessary, and proceeded to call the attention of the Court to the power con-

tained in the 213th section of the new Act. The debtor having duly presented a petition under the new Act, the Court was empowered to authorise his immediate release, which, he submitted, should be done in this case, unless the detaining creditors showed good cause to the contrary.

1849.

Re JOHN PYM.

The COMMISSIONER suggested that the Court could not discharge the debtor without having before it the judgments or records in the actions in respect of which the debtor was detained, as he could not otherwise be satisfied that the case did come within any of the exceptions mentioned in the proviso at the end of the 211th clause.

Linklater.—It would be seen that the Court is restrained from ordering the release of a debtor only in cases in which it appears from the judgment or record that the debtor is in prison for a debt contracted by fraud or other means mentioned in the proviso. Now, it was known to every one that a judgment or record in an action for debt did not disclose how the debt was contracted, and therefore, merely looking at the judgment or record, the Court would be wholly ignorant whether or not fraud had been practised in contracting the debt. He contended, therefore, that it was useless to adjourn this case merely for the production of documents the contents of which were already known to be silent on the only subject for which the Court required them.

His HONOUR (having consulted Mr. Commissioner Evans) stated that, as the legislature required it, he must have examined copies of the judgments produced to him; and an affidavit by the debtor that he had not contracted the debts by fraud, before he ordered the debtor's release.

Roxburgh applied to have the petition dismissed, and for the costs of his clients; but this application was opposed, and refused by the Commissioner.

1849.

Re JOHN PYM.

The debtor therefore remains in prison until the copies of the judgments are obtained, which must be done at his own expense.

(Before Mr. Commissioner EVANS.)

ANONYMOUS.

Jurisdiction.

Sec. 65 enumerates the persons who are to be deemed traders liable to become bankrupt, but does not restrict the time within which they must have resided or carried on business.

Sec. 89 enacts that the petition in such case shall be in the form in the schedule, and that form is applicable only to traders who have resided or carried on business for six months within the district.

Quære—

Would a case in which the bankrupt had so resided or carried on business be within the 65th sect. ?

But the Court will order the petition to be amended by the insertion of the fact of residence and the omission of the statement as to carrying on business.

AN application was made under the new Act on a petition for adjudication (which is now substituted for a fiat) against a trader who had been in business for four months only.

The solicitor for the petitioning creditor called the attention of the Court to the 65th clause, by which the persons therein enumerated are to be deemed traders liable to become bankrupt, and in which there is no restriction as respects the period of their carrying on business.

The 89th section, however, enacts that the petition shall be in the form mentioned in Schedule M, supported by affidavit; and on reference to the form, it will be found only to apply to traders who have resided or carried on business for six months immediately preceding the date of the petition, within the district of the Court in which the petition is presented. In the case before the Court the trader had only been in business for four months.

Mr. Commissioner EVANS inquired whether the trader had resided within the district for six months preceding the petition, and being answered in the affirmative, he directed the petition to be altered by the insertion of that fact, and the omission of the statement as to carrying on business.

The solicitor said it was important to know whether his Honour would have adjudicated in case the bankrupt had not resided or carried on business for the six months within the district.

The COMMISSIONER refused to give any opinion, saying he should not take upon himself to decide more than he was compelled under the Act.

1849.

ANONYMOUS.

The alteration was accordingly made, without any decision of this important question.

Ex parte MULLENS, *in re* MULLENS.

Thursday,
November 1st.

A PETITION for adjudication was filed in this court against Mullens, under which the said Mullens was adjudicated a bankrupt on the 27th of October last.

Disputed adjudication ; Solicitor and client ; Privileged communication.

Mullens now appealed to set aside the adjudication (under sec. 104 of the Bankrupt Law Consolidation Act), on the ground that the evidence of the alleged act of bankruptcy ought not to have been received, on the following grounds ; viz. that such evidence consisted of a deposition sworn to by a person who was at that time the solicitor for the appellant in various actions then pending against him, and which deposition contained matter communicated to the deponent in his character as solicitor for the appellant. The facts appear in the judgment. The evidence was heard in private.

A solicitor may be called upon to give evidence as to a communication made by his client to a third person in his presence, although such evidence would establish an act of bankruptcy against the client.

Lucas, counsel, in support of the adjudication, cited *Bramwell v. Lucas*, 2 B. & C. 745.

Bagley, counsel, contra, cited a dictum of Lord Eldon, reported in 16 L. J. Chit. Rep. 153 ; *Knight v. Turquand*, 2 M. & W. 99 ; Pullen's Law of Attorneys, 192, *et post*.

Monday,
{ November 5th.

Mr. Commissioner EVANS.—This was an application to annul a petition in bankruptcy that had issued against the appellant. In support of the application, it was contended that there was no legal evidence of the act of bankruptcy ;

Judgment.

1849.

—
Ex parte
 MULLENS,
re
 MULLENS.

and that if the evidence was admissible, it did not prove an act of bankruptcy. The evidence in support of the petition was mainly that of Mr. Evans. He stated that he had been solicitor to the alleged bankrupt; that the bankrupt was indebted to him; that he was much in want of the money, and he called upon him to ask for it on the ——— day of ———. That on that occasion the bankrupt stated to him that a number of persons were suing him, and handed him several writs, and asked witness whether he could not get him time. The witness stated, in some instances, he thought he could. That as he was going away, the bankrupt told his wife to deny him to any creditor who might call.

It was objected that this evidence was inadmissible, as being a privileged communication. In answer to this objection, the case of *Bramwell v. Lucas* was relied on; and doubtless if that case could be considered an authority, it would decide the case; for in that case the communication was made directly to the witness, in the present case it was made to a third party. This difference, as it appears to me, prevents the necessity of my considering whether *Bramwell v. Lucas* can be supported; but I think it right to say, that although I might consider the decision erroneous, I should feel myself bound by it until it is expressly overruled by a competent authority. The fact that the communication in this case was not made to the witness, nor in consequence of his advice, does not, in my judgment, permit its being, in point of law, a privileged communication. And this opinion is supported by *Greenough v. Gaskell*, 1 M. & K. 115, where Lord Brougham says:—"But the dictum of law laid down in this case is free from all doubt." It is, that the privilege should be excluded when the communication is not made or received professionally, and in the usual course of business. So in *Desborough v. Rawlins*, 3 My. & C. 521, Lord Cottenham says:—"But both *Bramwell v. Lucas* and *Greenough v. Gaskell* show that the privilege applies to cases in which the client makes a communication to his solicitor

with a view to obtaining his legal advice." I am therefore of opinion that the evidence is admissible.

It was suggested, on the part of the appellant, that the general order to deny was not a sufficient act of bankruptcy; but that it is a sufficient act of bankruptcy, there is, I think, no doubt. (*Belcher v. Gammon*, 9 Q. B. Rep. 874.)

It was proposed to call the bankrupt and his wife as witnesses.

Previous to the 6 & 7 Vict. c. 85, a bankrupt could not be called to explain an act which might defeat his commission (*Layer v. Garnett*, 7 Bli. 103); and the Act of Parliament expressly enacts that it should not render competent any party to any suit, action, or proceeding, individually named in the record. I continue of opinion that they were properly rejected. I shall therefore reject the application to annul the adjudication.

(Before Mr. Commissioner FONBLANQUE.)

Re TRACEY.

UPON the production of a book purporting to be the ledger of the bankrupt,

His HONOUR observed that the account in question, though it purported to have commenced several years ago, was entered subsequently to many others of recent date; and that there were many blank leaves intervening between the several accounts. He could never consider a ledger to be satisfactorily kept, unless the accounts were entered continuously, according to their proper priority, and without any intervening blank leaves. There ought also to be a regular index.

1849.

Ex parte
MULLENS,
re
MULLENS.

Friday,
November 2nd.

Bankrupt's
books; Credi-
bility of ac-
counts.

1849.

Wednesday,
November 7th.

Re SMART.

MR. COMMISSIONER FONBLANQUE.—It is not sufficient that there should be books ; they must be properly kept, and balanced from time to time, so that at any time the real state of the trader's affairs may at once appear.

Note.—Mr. Commissioner Fonblanque has had frequent occasion to repeat the above judgments ; but as his opinions on this subject have been expressed almost *totidem verbis* with the above, we forbear to occupy space with separate reports on the same subject.

(Before Mr. Commissioner GOULBURN.)

Friday,
November 2nd.

Re WOODROFFE.

Partnership ;
Proof ; Admis-
sion of pay-
ment.

The assignee of a joint-stock company, which has become bankrupt, is not entitled to prove for deposits or contribution against the estate of a shareholder in the company, who has also become bankrupt. Where in the company's deed the deposits are set forth as paid, the representative of the company will not be allowed to show that such deposits were not paid.

THE bankrupt came up for his last examination. A proof was tendered by the official assignee of a joint-stock company, entitled the Merchant Traders' Ship, Loan, and Assurance Company, for a sum of 1,050*l.*, claimed to be due in respect of certain shares allotted to the bankrupt.

It appeared, from the bankrupt's examination, that he was a clerk in the above-named company : that, in order to comply with the terms of the Joint-Stock Registration Act, requiring that it should appear on the company's deed that a certain number of shares had been taken ; and, in order to enable the company to obtain an Act, the directors had allotted a number of shares to their officers, and, among others, 500 of such shares to the bankrupt : that the bankrupt had accepted such shares, and signed the deed. Upon the production of the deed, it appeared on the face of it that the deposit on such shares had been paid.

The bankrupt admitted that he had not paid the deposits.

A further claim was made against the bankrupt for contribution under the bankruptcy of the company.

1849.

Re
WOODROFFE.

Lawrence, solicitor, opposed on behalf of the bankrupt.

Mr. Commissioner GOULBURN.—This is an attempt by one partner to prove against the estate of his copartner; for this reason I cannot admit the proof, either as to the deposits or distributive shares claimed by the company. Even if this were not so, I must reject the proof as to the deposits, since it appears on the face of the deed that they were paid. I will not allow the representatives of the company to contradict their own admission.

ANONYMOUS.

A PETITION for arrangement had been presented by a trader debtor, under sec. 211 of the Bankrupt Law Consolidation Act. An official assignee was appointed, to whom it was referred to inquire and state to the Court whether the petitioner had 200*l.* and upwards ready to be produced, as was stated in his affidavit in support of the petition (the affidavit in the form set forth in the Schedule B).

Trader debtors;
Petition; Assets.

Reversionary interests and property abroad held not to be assets ready to be produced, under the provisions of the trader debtor arrangement clauses of the Bankrupt Law Consolidation Act.

The petitioner was in custody under several judgments. The assets referred to in such affidavit consisted of a present interest in a reversion which would come into possession at the decease of some persons of advanced age, and of property abroad.

The official assignee reported that he had inquired as to the value of the property, and that he was not satisfied that there was 200*l.* ready to be produced.

Catlin, solicitor, for the petitioner, contended that his client might be discharged from custody, and contended that he had fulfilled the conditions required by the statute; that the

1849.

ANONYMOUS.

property was sworn to in the affidavit, and though not now in possession, was of considerable value, and might be converted into money—the same applied to the property abroad; that the purchase-money which would be received on such sale would be sufficient to pay 20s. in the pound to the petitioner's creditors.

Mr. Commissioner GOULBURN.—I consider that this statute has given a most valuable privilege to a certain class of traders; namely, to those who take the opportunity of coming into this court prepared to divide a certain sum at least between their creditors. It is permitted to them to wind up their affairs in this court without incurring the odium of a public bankruptcy. I must construe this part of the Act strictly. I should do wrong if I were to extend this boon (given, as it is, by the legislature to traders who have assets immediately available for their creditors) to those who would come here with nothing, or with mere chances of getting something. I am by no means satisfied, in the absence of any evidence as to its value, that I would be justified in considering that property of such uncertain value as reversionary interests would fulfil the conditions of this enactment. It is not sufficient that some speculative value is put upon this reversion. If it were worth the sum required by the Act, it should have been sold, and the money brought into court. I am of the same opinion with regard to the property abroad. The petitioner has offered nothing substantial to his creditors. As to the petitioner's affidavit, I must look at it with great doubt. It is too well known that men in difficulties will delude themselves into the belief that their affairs are in a better state than they really are, and consider almost anything, however remote or uncertain, as available assets. I cannot be governed by any such vague beliefs. I do not consider that the petitioner has at all satisfied me that he has such assets as are required by the Act. I cannot order his discharge. I further consider that he has not

complied with the conditions of the Act. I must therefore exercise the authority vested in me by sec. 223, and adjudge him a bankrupt, and adjourn the proceedings into public court.

1849.

ANONYMOUS.

In the course of the case, the Court offered to release the petitioner, upon the condition of his giving security for the judgments, under the powers given for that purpose in sec. 24.

Catlin declined, on the part of his client, to accept these conditions, as it would be impossible for the petitioner to comply with them.

(Before Mr. Commissioner FANE.)

Re PRICHARD AND DALE.

JAMES, counsel, for a creditor who had proved his debts against the joint estate, and who held securities on the estate of Prichard, applied for leave to inspect the separate books of Prichard, with a view to the certificate.

A solicitor opposed the application.

Tuesday,
November 6th.

A creditor who has proved against the joint estate is not entitled to inspect the separate books.

Mr. Commissioner FANE.—The general rule in this court is, that all persons who have proved are entitled to inspect the bankrupt's books. Here the application is for a person who has proved against one estate to inspect books relating to the other. The argument is, that these two are connected; therefore, I am not disposed altogether to refuse the application, but I cannot grant it now. The proper course would have been for the creditor to have realised his securities, and to have proved for the residue; he then would have had a *locus standi* here.

1849.

(Before Mr. Commissioner EVANS.)

*Thursday,
November 8th.*

BOWERS AND COMPANY.

Removal of
fiat.

The Senior Commissioner will order a fiat to be removed to the district in which the bankrupt, the assignee, and the greater number of creditors reside, and the estate is situate.

See sec. 90,
Bankrupt Law
Consolidation
Act.

THE bankrupt resided and carried on business at Worcester.

On an application made to the Lord Chancellor (previous to the Bankrupt Law Consolidation Act coming into operation), showing that the greater number of the trade creditors resided in London, his lordship was pleased to order that the fiat should be transferred to, and proceeded with, in the London district.

Upon a further examination of the affairs of the bankrupt, it appeared that the statements laid before the Lord Chancellor were erroneous, and that, in fact, the greater number of creditors resided at Worcester; it also appeared that the bankrupt still resided at Worcester, as did the sole assignee, and that the estate was also within the same district.

Vallance, solicitor, for the assignees, produced an affidavit of the above-mentioned facts, and applied that the commission should be transferred back to the Worcester district.

Lawrence, solicitor, for a creditor residing in London, consented.

Mr. Commissioner EVANS.—This is a proper case for the exercise of my jurisdiction. Let the fiat be transferred back to the Worcester district.

1849.

(Before Mr. Commissioner GOULBURN.)

ANONYMOUS.

*Saturday,
November 10th.*

AN alleged trader debtor appeared in obedience to the summons of the Court (under sec. 78 of the Bankrupt Law Consolidation Act), and did then deny the demand of the summoning creditor, and made the deposition required by the Act (Schedule J), that he had a good defence to such demand.

Trader debtor's
summons;
Bond; Evi-
dence.
The Court will
not try the va-
lidity of the
debt.

Lucas, counsel, for the alleged debtor.—I propose to tender evidence of the truth of the statements in the deposition, viz. that there was a good defence to the summoning creditor's demand. It is in the discretion of the Court to require a bond to secure the payment of such sum and costs as may be recovered in any action which he brought for the recovery of the demand. It is a necessary incident to this discretion, that the Court has authority to examine into the nature of the alleged defence. If the Court will receive the evidence I propose to tender, it will appear that we have a sufficient defence, and that it is not a case in which the Court will require the bond. I propose to call the summoning creditor and the trader debtor.

Linklater, solicitor, contra.

Mr. Commissioner GOULBURN.—What you require of me now is, to try whether the demand of the summoning creditor is a good and just demand, or not. If I were to do so, I should usurp the jurisdiction of a Court of Law, and decide by myself a case which ought to go before a jury. I have no jurisdiction to do so. If I were to receive the evidence proposed, I should prejudice any case which may be brought before another tribunal, although I could not decide on it

1849.

ANONYMOUS.

myself. I must refuse to receive the evidence. I must also require the bond; but as the sum to be secured is very considerable, and the debtor resides at Norwich, he may reasonably be expected to find some difficulty in finding the necessary sureties at once. I will therefore enlarge the time for entering into such bond seven days. There can be no hardship in this, for, should the trader debtor fail to do what I require, he will be adjudged a bankrupt; but he will then have the right to dispute the demand; and if he succeeds in so doing, the adjudication against him will be annulled.

(Before Mr. Commissioner SHEPHERD.)

Monday,
November 12th.

Ex parte SPOTTISWOODE, *re* OWEN RICHARDS.

Lien; Reducing
proof; Mistake.

Where a person proves for a debt, in ignorance that he has a lien for such debt, he will not be allowed, when he discovers his mistake, to set up his lien, and reduce his proof accordingly.

THIS matter came before the Court on the petition of Andrew Spottiswoode.

The petition stated—"The issuing of the fiat, and that William Benning and others were chosen assignees of the bankrupt's estate, and Turquand was appointed official assignee.

"That in April, 1846, the petitioner had agreed with the bankrupt to print a work entitled 'Commentaries on the Laws of England,' by George Boyer, D.C.L., barrister-at-law.

"That the petitioner, subsequently to the fiat, but previous to the choice of assignees, was informed by the said William Benning that the books or copies of the said work which the petitioner had then in his possession were the property of the author, and not that of the bankrupt, and that he could claim no lien on them; and that therefore he proved, on the 1st of February, for the whole amount of his claim against the bankrupt's estate."

The proof was made on three bills of exchange for the several sums of 93*l.* 9*s.* 3*d.*, 73*l.* 9*s.* 9*d.* and 201*l.* 11*s.* respectively.

It was further stated—"That the petitioner afterwards amended his proof to the sum of 665*l.* 18*s.* and subsequently received dividends on his said proofs, amounting, in the whole, to the sum of 155*l.* 7*s.* 5*d.*

1849.

Ex parte
SPOTTISWOODE,
re
O. RICHARDS.

"That, subsequently to the receipt of such dividends, the petitioner was informed by the said William Benning that the said books, &c. were not the property of the author, but of the bankrupt; and an offer having been made for the purchase of the said books, &c. the petitioner, with the knowledge and consent of the said William Benning, and without prejudice to any question of lien, sold the said books, &c. for the sum of 95*l.*

"That immediately after such sale, the petitioner sent an account thereof to the official assignee of the bankrupt's estate, believing that he would be allowed to reduce his said proof; but, on the contrary, the petitioner was applied to by the official assignee, to deliver up to him all the books, &c. which the petitioner had in his possession, as being the property of the bankrupt.

"That the petitioner refused to comply with such demand, and that an action at law was commenced against him by the assignees for the recovery of the said sum of 95*l.* in which action notice of trial had been given."

The prayer was—

"That the petitioner might be allowed to reduce his said proof by the sum of 95*l.* and that he might be allowed to retain the same in part discharge of his debt—the petitioner offering to refund the dividends to that amount; and that further proceedings in the said action at law should be stayed, and for the further order of the Court," &c.

The petition was supported by the affidavit of the petitioner.

The petitioner and the said William Benning were examined *visà voce* as to the truth of the statement made in the petition.

1849.

Ex parte

SPOTTISWOODE,

re

O. RICHARDS.

There were two dividends, and the sale of the books took place between the first and second dividends.

The work in question was published on the principle of half profits ; that is, that the author was to use his labour, and the bankrupt to furnish paper and printing.

Lucas, in support of the petition.—This is a petition which, prior to the late Act coming into operation, would have gone before the Vice-Chancellor, to whom matters of bankruptcy were referred. This Court now has jurisdiction to decide this matter. I rely upon the well-established principle of equity, that where parties act in ignorance of their rights and *bonā fide*, the Courts will restore them to such position as they would have been in had they been aware of their rights. There was no contract between the petitioner and the author ; the latter could claim no property in the books, until the charges for printing, &c. should be paid, according to the custom of the trade ; they were, therefore, the property of the bankrupt, subject to the petitioner's lien. The petitioner was not aware that he had such a lien at the time he made his proofs ; he was misinformed, and acted in ignorance of his right to the books. The mistake arose in consequence of the information of William Benning, one of the assignees, who is in the trade, and might be considered by the petitioner as a competent authority. Were it not for this mistake, he would have retained his lien on the books, and proved for the residue of his debt ; and he had an undoubted right to do so. What he now asks is for the Court to restore him to this right, and to allow him to do that which he was entitled to do, and would have done, if he had not been misinformed. The course which the petitioner followed was known to and approved of by Benning, one of the assignees. He was therefore justified in considering that the assignees concurred with him, and an account of the sale was furnished to the official assignee. It does not appear that all the assignees concurred in bringing the action.

Bagley, contra.—The proofs which the Court is now called upon to amend were made as far back as 1846. The Court is also asked to let in a security which was not stated on either of the proofs; if the security had appeared, the petitioner could not then have proved without giving it up, or without an order from the Court above. The petitioner also prays that this Court will grant an injunction to restrain an action at law. It is to be doubted whether there is jurisdiction here to do so. The Lord Chancellor would, in urgent cases, grant such an injunction, not by virtue of the bankrupt laws, but under the general equitable jurisdiction vested in him over matters in bankruptcy. It is stated on the other side, that the petitioner was not aware of the existence of his lien at the time he made the proofs; but it does not appear that he took any care to ascertain whether he had a lien or not. He is himself in the trade, and should have known whether the books were the property of the author or of the bankrupt. He treated the bankrupt as his only creditor; at the time of the bankruptcy, it must have occurred to him to make inquiries as to whether he had any security for his debt or not; he is satisfied on that point by the opinion of Mr. Benning, who is not a competent person to give advice in a matter involving a question of law, and who at that time was a stranger to the transactions. The petitioner ought to have taken proper legal advice; if he had done so, he would have known whether he could retain his lien or not; but instead of taking the obvious course, he has acted on the advice of Benning, and made his election to prove, which is conclusive against him; since then he has slumbered on his rights, and now, at a very remote period, asks this Court to give him a remedy for his neglect. It has not been established that the petitioner had a lien on the books; all that has been urged on that point is, that, according to the custom of the trade, he had such a lien. But the question of lien is to be governed by the legal doctrines on that head, and not by the notions that persons belonging to any particular trade may have among themselves

1849.

Ex parte
SPOTTISWOODE,
re
O. RICHARDS.

1849. upon the subject. It is a question whether the petitioner could have sold the books previous to the bankruptcy ; but the fact of the bankruptcy concludes the question. Under these circumstances, the books ought to have been delivered to the official assignee. The fact of the sale was unknown to the official assignee till November, 1848. A correspondence then took place between him and the petitioner ; the letters of the petitioner show that he must have been aware whose property the books were. The petitioner offers to refund a portion of the dividends improperly, as he alleges, received by him as a set-off against the sum for which the books were sold. There can be no such question now, as there is no mutuality between the petitioner and the assignees. The assignees have a right to recover the value of the property so improperly sold.

Ex parte
SPOTTISWOODE,
re
O. RICHARDS.

Lucas, in reply.—The fact of the petitioner's lien appears on the balance-sheet. When the petitioner received the second dividend, he was under the impression that it was made on the claim reduced by the amount for which the books were sold. No injury would be done by the Court acceding to the prayer of the petition, as all parties would be remitted to their original rights. In *Grugeon v. Gerrard*, 4 Y. & C. 131, Maule, J. declared—"Great anxiety is properly felt by those who administer jurisdiction in bankruptcy against permitting persons who have proved on the footing of holding no security, afterwards to withdraw their proof and set up a security ;" but where, as in this case, the proof has obviously been made in ignorance of the existence of the security, it is highly probable that the Court would give relief.

Mr. Commissioner SHEPHERD.—There has certainly been a mistake, the consequences of which must be borne by those who were in error.

Petition dismissed, with costs.

1849.

(Before Mr. Commissioner FONBLANQUE.)

ANONYMOUS.

*Wednesday,
November 14th.*

IN this case an action had been brought by the summoning creditor against the trader debtor. After the summons had been served upon him, the defendant pleaded to the action, and paid the greater part of the plaintiff's demand into the court in which the action had been brought. The defendant had changed the venue in such action into the county where all the parties reside, and where the cause of action arose.

Summons of
trader debtor ;
Bond.Where the
greater part of
the demand of
the summoning
creditor has
been paid into
court, and the
balance is not
in danger, the
Court will not
require the
bond.

It was contended, on behalf of the summoning creditor, that the Act requires the Court to compel the trader debtor to enter into the bond to secure the balance and costs ; and that if the Court had a discretion as to the bond, the fact of the venue being changed was vexatious, and, for the purpose of delaying the plaintiff, would be a sufficient cause for the Court to exercise such discretion, and to require the bond.

Mr. Commissioner FONBLANQUE.—It is clear that the Act gives me a discretion according to the merits of the case. In this case, unless special circumstances be shown to the contrary, I do not think I ought to require the bond. The greater part of the demand having been paid into court, is a guarantee for the good faith of the defendant in the action ; and I cannot consider the change of the venue vexatious. The question of the bond may stand over till Friday next, when, if it shall be shown to me on sufficient evidence that the balance is in danger, I will order the bond to be entered into.

The solicitor for the summoning creditor came up, and consented to dispense with the bond.

*Friday,
November 16th.*

1849.

(Before Mr. Commissioner HOLROYD.)

Friday,
*November 16th.**Re* ALLISON.Mortgage;
Furthercharge;
Proof of debt.A mortgagee
of part of the
bankrupt's es-
tate, who also
has a further
charge on the
premises, may
retain his mort-
gage security,
and may prove
for the residue
of his debt on
giving up the
further
charges.

THIS was the application of the Rev. H. Palmer. In the year 1845 the Rev. H. Palmer advanced to the bankrupt the sum of 4,000*l.* to be secured by a mortgage on certain leasehold property in the bankrupt's possession, for the whole of the bankrupt's term in the said leaseholds, less one day. In the years 1847 and 1848 further sums, amounting in the whole to the sum of 9,179*l.* odd, upon various securities, and among others, a further charge by way of equitable mortgage on the leaseholds, subject to the mortgage of 1845.

Bagley, for the Rev. H. Palmer, applied to be permitted to retain the mortgage of 1845 for the sums secured by the same; and, as to the further sums, to be allowed to prove for them upon giving up all the further securities.

It was argued on the other side, by the solicitor for the assignees, that the Rev. H. Palmer ought to elect whether to retain the whole of his securities, or to give them all up and prove under the fiat.

Mr. Commissioner HOLROYD.—I am of opinion that the creditor is entitled to retain the mortgage of 1845, and upon giving up all other securities to prove for the residue of his debt; but the payment of the dividend must be stayed till the further order of this Court. The condition upon which such order will be made is, that the assignees shall be indemnified against any loss that may be sustained by them in respect of their interest in the leases, subject to the mortgage.

1849.

(Before Mr. Commissioner GOULBURN.)

*Re M'CLEOD.**Saturday,
November 17th.*

THIS was the application of a bankrupt to be released from custody, under the Bankrupt Law Consolidation Act, sec. 112. Notice had been served on the detaining creditor, and a copy of causes produced, by which it appeared that the bankrupt was detained under a judgment in an action of covenant. The detaining creditor did not appear.

Bankrupt's discharge from custody; Evidence.

On an application on behalf of a bankrupt in custody to be discharged, it must appear from an office copy of the judgment that the imprisonment is not in consequence of any of the matters excepted from the operation of the Act.

Mr. Commissioner GOULBURN.—The copy of causes is not sufficient to satisfy my mind that the bankrupt is not detained in prison by reason of any of the matters excepted from the operation of this section. The Act expressly requires that the cause of imprisonment should be shown by the judgment-order or commitment. I can receive no other evidence. I am of opinion that I could give the discharge on an office copy of the judgment being produced, to show that the imprisonment is for the cause stated on behalf of the bankrupt.

(Before Mr. Commissioner EVANS.)

*Re F. KELL IRWIN.**Monday,
November 19th.*

UPON the affidavit of David Ainsworth, it appeared that Irwin is a trader, and for six months immediately preceding September last, continued to reside and carry on business at Hexham, in the county of Northumberland, and that on or about the 1st of September last left Hexham, and departed

Jurisdiction of Senior Commissioner over petitions for adjudication; Petition for adjudication.

By the Bankrupt Law Consolidation

Act, sec. 89, & Schedule M, it is required that the petition for adjudication should state that the trader against whom the adjudication is prayed resided or carried on business for six months immediately preceding the date of the petition within the district of the Court in which the petition is to be proceeded with.

1849.

Re

F. KELL IRWIN.

from his dwelling-house, with intent to defraud and delay his creditors. The affidavit went on to state that the said Irwin was indebted to deponent, and that deponent was advised and believes that the said Irwin had committed an act of bankruptcy.

Upon the application of *Reed*, solicitor for petitioning creditor, and on reading the above affidavit,

It is ordered, that the petition for adjudication in bankruptcy against Irwin be prosecuted in the Court of Bankruptcy for the Newcastle-on-Tyne district.

(Before Mr. Commissioner HOLROYD.)

Tuesday,
November 20th.

Re a Petition for Adjudication.

It is not sufficient for a solicitor to sign his own petition in the presence of his clerk. Bankruptcy Law Consolidation Act, sec. 89, and Schedule M.

See per 1-
52

IN this case the petitioning creditor was an attorney of the Court, and had signed his own petition in the presence of his clerk. Under sec. 89 of the new Act, and Schedule M, annexed, it was contended that such signature and attestation were sufficient.

Mr. Commissioner HOLROYD.—I do not think that the signature and attestation on this petition are sufficient. The petitioning creditor, though an attorney, cannot be his own witness, and the attestation of the clerk is not that which the Act requires. This case does not come within *Downes v. Garbet*, 2 Dow. N.S. That case applies to warrants of attorney which are required to be witnessed by a solicitor, under stat. 1 & 2 Vict. c. 110. There the attestation of the solicitor was for a particular purpose; viz. that of showing that the person who signed the warrant was aware of the effect of that instrument. Here the purpose is different; the attestation is to operate as a check upon petitions being improperly

filed. I must declare the petition insufficient. I do not think I can order it to be taken off the file. The application may be renewed.

1849.

Re JOHN THOMSON.

THIS was an application by an equitable mortgagee of the bankrupt estate for the usual order for taking accounts, and for sale of the mortgage estate.

Equitable mortgage; Order for account and sale.

Quere—Can the Court order an account to be taken and sale to be had of an equitable mortgage where there is a prior mortgagee who does not consent to the order?

Hodson, for a prior mortgagee.—We object to this order being given. We are legal mortgagees of the bankrupt's estate; the Court has no jurisdiction to order a sale against us. The jurisdiction is given to the Court by sec. 12 of the Bankruptcy Law Consolidation Act. It is there declared that the Court, in exercise of its jurisdiction, &c. shall have superintendence and control in all matters of bankruptcy, and shall have, &c. and make order in any matter of bankruptcy whatever, so far as the assignees are concerned. It then sets forth the jurisdiction over creditors, and the bankrupt's estate and effects; these words then follow, "or any other person appearing and submitting to the jurisdiction of the Court." This action cannot apply to us; we have not proved, or attempted so to do; we have elected to continue to hold our security; we are, therefore, not creditors within the meaning of the bankrupt laws. There is no question between us and the assignees. We are strangers to the bankruptcy. The words "or other persons" exempt us from this section, unless we submit, and we do not submit to the jurisdiction. I submit that the order cannot be made against us.

A solicitor, for the second equitable mortgagee.—The prior incumbrance is a mortgage of a reversionary interest in certain leaseholds, bequeathed in trust for persons now living, and after their decease to be sold, and the produce to be

1849.

Re

J. THOMSON.

divided between the bankrupt and other persons. It is therefore a mortgage of an equity, incapable of being reduced to possession. We have had no notice; therefore there can be no priority. We have equal rights with the prior mortgagee, and the Court can order an account for the benefit of all parties. Sec. 12 gives a jurisdiction in these matters. *Ex parte Robinson*, 2 Deac. & Ch. 101, was relied on.

Mr. Commissioner HOLROYD.—I cannot decide upon the question of priority. A Vice-Chancellor acting in bankruptcy could not have done so. The question of priority must be decided in Equity. The section can give this Court no jurisdiction which the Court above had not. (*Ex parte Cowan*, 3 B. & Ald. 130.) I must dismiss the application, but the second mortgagee may be at liberty to apply again, if he can produce any authorities to show that this Court has jurisdiction.

(Before Mr. Commissioner EVANS.)

Tuesday,
November 20th.

Ex parte KING, re WHITE.

Equitable mortgage; Order of sale; Delay by assignees; Further order; Assignee permitted to bid.

THIS was the petition of King, stating that on the 16th of January, 1849, the petitioner presented to the Vice-Chancellor acting in bankruptcy a petition, stating that he was equitable mortgagee of a certain indenture of lease, and praying for the usual order for an account and sale, to prove that if the moneys to arise from the sale should be insufficient to pay the amount due to the petitioner, that he might be permitted to prove for the deficiency under the fiat.

That on the 24th of January, the said petition came on for hearing, and the Court was pleased to make the usual order for an account and sale of the mortgaged premises, &c.

That on the 13th of February, the petitioner attended before the Commissioner acting in the fiat, to take the

accounts under the order of the Vice-Chancellor, when the Commissioner found that he was equitable mortgagee of the said lease for 30% and interest from the date of the deposit thereof, viz. the 30th of September, 1844, and the solicitors for the assignees then undertook to proceed with the sale.

That on the 22nd of February, the solicitor for the petitioner furnished the solicitor for the assignees with an abstract of the said lease, and undertook to produce the lease for examination.

That, on behalf of the petitioner, an offer was made to the assignees, that on the payment to him of the debt and interest, with the costs of his solicitor, he would give up the lease to the assignees. This was declined by the assignees. The assignees were then requested on several occasions to proceed with the sale, and that on the 1st of May, it was proposed, on behalf of the assignees, that the sale should be by auction, and that the assignees might be indemnified by the petitioner against the costs of the sale.

This was declined on behalf of the petitioner. That notwithstanding that they were frequently applied to for that purpose, the assignees did not proceed to a sale up to the date of this petition.

That the petitioner believes that the assignee has for some months past been receiving the rent of the mortgaged premises from the tenant thereof.

The petition prayed that the order of the 29th of January might be amended, by directing that the petitioner might be at liberty to sell the mortgaged premises, and that the assignees and all proper parties might be ordered to join in the sale and conveyance; the petitioner to apply the proceeds of the sale in payment to himself of the debt and interest found due to him, and of the costs of the former petition, and the proceedings consequent thereon, and to pay to the official assignee any surplus of the purchase-money; and that the assignee might be ordered to pay the costs of the present petition, and for the further order of the Court.

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1849. The petition was supported by proper affidavits.

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Lucas, counsel, appeared in support of the petition.

The COURT was pleased to order that the assignee should proceed to a sale of the mortgaged premises within a month ; the assignee to have leave to bid. The costs were reserved.

(Before Mr. Commissioner HOLROYD.)

Friday,
November 23rd.

Ex parte SHEARMAN, *re* GOULD.

Petition for adjudication ; Solicitor who is petitioning creditor signing his own petition in presence of his clerk ; New petition.

THE facts of this case appear *sup.* p. 28, *Re a* Petition for Adjudication, Nov. 20.

The petitioner had obtained the leave of this Court, and filed a new petition ; but before the necessary affidavits could be prepared, the petition of a stranger against the same bankrupt was filed.

Fooks, counsel, for Shearman, the original petitioning creditor, and in support of the first petition.—Refer to sec. 89 of the Bankrupt Law Consolidation Act, and the form of the petition in Schedule M. The form of the petition must be taken to mean that part which ends with the words “ Your petitioner shall ever pray.” The attestation clause forms no part of the petition ; no attestation is referred to by the statute. The form of the petition is on the same footing as that of a deed, of which the attestation forms no part. Assuming that the attestation clause is to be considered as a part of the form, then it must be taken to be a matter not of substance, and the statute should be held to be directory, and not compulsory, in this respect. (*The King v. The Inhabitants of Birmingham*, 8 B. & Cr. 29 ; Dwa. on Stats. 611.) This statute is remedial, and, as to all matters not of essence, should be considered directory, and not compulsory. (Dwa.

on Stats. 632.) The attestation in this case is not necessary ; the Court might dispense with it altogether, in analogy to the construction put upon the stat. 1 & 2 Vict. c. 110, which requires the attestation of an attorney to warrants of attorney. (*Downes v. Gabbett*, 12 L.J. N.S. Q.B. 269, and *Chipp v. Harris*, 5 M. & W. 269.) And again, in *Portland v. Row*, 1 Dow. N.S. 183, it was held that it is not necessary to explain the nature of a declaration in ejectment where the person on whom it is served is an attorney.

Though the orders of the Court of Chancery required that petitions in bankruptcy should be attested by an attorney, it has been held, that where it appeared on the face of the petition that the petitioner was an attorney, the rule did not apply. Here, though that fact does not so appear, it appears on the attestation ; but put the attestation out of the question as forming no part of the petition, the petitioner is here to be examined, and the Court will take notice that he is an attorney.

As to the restraint that an attorney may exercise over a petitioning creditor, it is not necessary in this case, as the Court will exercise its authority over its own officer.

Mr. Commissioner HOLROYD.—I agree with the arguments of the learned counsel, but I come to an entirely different conclusion. The attestation to petitions for adjudication is no part of the form of the petition, and the Act is so far directory. The question for me to decide is, whether I ought to require an attestation in the words pointed out, or not : it would be going too far to say they do not belong to the Act. In *Ex parte Steel*, 16 Ves. it was held to be inexpedient that the petitioning creditor should be solicitor to the fiat ; and in *Ex parte Badcock* the same opinion was expressed as to an assignee being solicitor to the fiat. I am now to consider whether, in the exercise of my discretion, I ought to depart from the letter of the Act to permit that which the Courts have held to be inexpedient. I think not. When

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this case came before me on a former occasion, I expressed my opinion that the cases relating to warrants of attorney do not apply to the present case. I cannot overlook the fact that it does not appear on the face of the petition that the petitioner is an attorney. I must reject the petition.

Before Shearman could prepare the depositions in support of his second petition, a petition against the same bankrupt had been filed by another person.

The question arose as to whether Shearman's petition or that of the stranger should be proceeded with.

Mr. Commissioner HOLROYD.—Shearman was first in court; his first petition is rejected for informality; his other petition is in the nature of an amendment of his first. It must have priority over the petition of the stranger, and be proceeded with.

(Before Mr. Commissioner HOLROYD.)

Thursday,
November 29th.

Re H. EMMINGS.

Proof of debt;
Effect of bank-
ruptcy on the
Statute of
Limitations.

A debt set forth in the schedule of a person who has obtained his discharge in the Insolvent Court, and afterwards become bankrupt, may be proved under the fiat. The schedule was more than six years old.

THIS was an application by a creditor, whose debt was set forth in the schedule filed in the Insolvent Court, to be allowed to prove his debt; it was objected that the debt was barred by the Statute of Limitations.

Mr. Commissioner HOLROYD.—My judgment in *Ex parte Robinson, in the matter of Lyon*, applies exactly in the present case. It was as follows:—In this case (*Re Lyon*) the bankrupt took the benefit of the Insolvent Debtors Act in the year 1836, and filed his schedule in the Insolvent Debtors Court in the month of April in that year. The schedule contained (amongst other things) the debt of Robin-

Held, that the Statute of Limitations did not operate against it.

Six years afterwards, previous to the fiat, the bankrupt filed his schedule in the Insolvent Debtors Court, and afterwards obtained his discharge.

son. In July, 1842, a fiat issued against Lyon, under which he was declared a bankrupt, and Robinson now seeks to prove under the bankruptcy for the debt which was set forth in the bankrupt's schedule under his insolvency. The Court entertained no doubt that a creditor of an insolvent trader who had been discharged under the Insolvent Debtors Act, and subsequently became bankrupt, might prove his debt under the fiat in bankruptcy, although it was included in the insolvent's schedule under his insolvency. This was fully established in *Tellis v. Mountford*, 4 B. & A. 256; *Ex parte Fenwick*, 2 M. & A. 681; and *Ex parte Barrington*, 1 Deac. 3. The ground of the decision in those cases was, that the Insolvent Act did not extinguish the debt; that, notwithstanding the discharge of the insolvent, by the whole language of the statute, the debt was intended to exist and continue still a legal debt until satisfaction by payment.

It was argued that it would be very hard to admit the proof of such a debt as against the new creditors, and, at all events, they ought to be preferred in the payment of their debts to the creditors under the insolvency. But although a Court of Equity, upon a bill filed, has power to marshal assets amongst different classes of creditors, this could not be done upon petition in bankruptcy. This Court must follow the distribution provided by the bankrupt laws, which is, that the bankrupt's estate shall be divided amongst *all* the creditors who have proved under the fiat, in proportion to their respective debts. *All* are to share *pari passu*; the joint estate going to pay the joint debts, and the separate estate the separate debts, carrying over any surplus (as the case may be).

As to dividing the property amongst subsequent creditors, it would be very difficult to say who are specific creditors of particular property, so as to give a right for claims exclusively to attach upon it. The main point, however, for the Court to determine in the present case, is whether, more than six years having elapsed since the schedule was filed in the

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Insolvent Debtors Court, the proof of such debt under the bankruptcy is now barred by the Statute of Limitations. Now upon this point it may be premised that the Statute of Limitations, in cases where it is applicable, bars the remedy, and not the debt ; but there are different classes of cases in which it has been held that the Statute of Limitations does not run ; as, where a fiat has issued, the proof of a debt not barred by the statute at the time of the issuing of the fiat will not be barred by any lapse of time afterwards, the fiat being considered in the nature of a trust ; and in cases of trust, the statute does not run. (*Ex parte Ross*, 2 Gl. & J. 46 & 330.) So, if a man by will charge his real or personal estate for payment of his debts, or make a devise or bequest for payment of all his debts in equity, the statute is thereby prevented from running against any debts not barred in the lifetime of the testator (*Jones v. Scott*, 1 Russ. & M. 255); and in *Trueman v. Fenton*, Cowp. 548, Lord Mansfield said, a Court of law, in a case properly brought before them, would say the same, on the principle of giving effect to that intention. So a liability arising in respect of a lien is not barred by the Statute of Limitations ; and upon a bill filed for the administration of a deceased insolvent's assets, the right to relief in a court of equity is not affected by the Statute of Limitations, the debts in the schedule of the insolvent being considered as liabilities in respect of a lien created by statute. (*Barton v. Tattershall*, 1 Russ. & M. 237.) In the case now before the Court, it was like establishing a trust by the debtor, the effect of which is to convert the creditor into a *cestui que trust*, and therefore it is not competent for the assignees under the bankruptcy, who represent the debtor in the administration of his assets, to take advantage of the Statute of Limitations, when the debtor, by creating the trust in the Insolvent Debtors Court, had in effect declared that the Statute of Limitations should not operate. It is perfectly clear that the property now administering under the bankruptcy would have been applicable to the payment of this

debt, amongst others, if administered in the Insolvent Debtors Court, which it would have been but for the bankruptcy; and although it was enacted by the Insolvent Act (7 Geo. 4, c. 57), under which the bankrupt obtained his discharge, that if at any time after the assignment by the prisoner he shall obtain his certificate in bankruptcy, the power of the assignees in the Insolvent Debtors Court over any property remaining to the prisoner after obtaining his certificate shall be the same as if the assignment had been valid; still the title of the assignees under the bankruptcy is preserved, as well as the full benefit of the certificate to the insolvent. It would therefore be hard upon the creditor, if the law compelled his proof to be rejected under the bankruptcy. The proof was admitted.

The proof in case must be admitted for the same reasons.

(See *Ex parte Garnett*, 1 De Gex, 95.)

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Re
 H. EMMINGS.

(Before Mr. Commissioner FONBLANQUE.)

Ex parte NAIRNE, re NAIRNE.

Friday,
December 14th.

THIS was the petition of Edward Nairne, the bankrupt, for leave to surrender, he having failed to do so at the time prescribed for that purpose. The circumstances of the case were as follows:—

In July last the bankrupt left his usual place of business, and went to Boulogne, as was alleged, for the purpose of avoiding criminal proceedings against him. A few days after, a fiat in bankruptcy issued, under which he was adjudicated a bankrupt, and a day was appointed for him to surrender, on which day he did not appear; a warrant issued for his apprehension, and an order was subsequently obtained, by which

Non-surrender of Bankrupt; Application for leave to surrender refused.

The bankrupt Nairne absconded previous to the adjudication, and did not surrender at the time appointed for his last examination; criminal proceedings were commenced against him for the

non-surrender, and a warrant having been issued against him, he was taken in France by virtue of the convention between the two kingdoms for the surrender of certain offenders; he was then taken before a magistrate, and after several examinations, was committed for trial. The bankrupt alleged that he absconded from causes foreign to the bankruptcy.

The Court refused to allow the surrender.

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the assignees were directed to commence criminal proceedings for the non-surrender. The bankrupt was taken abroad by virtue of such warrant, and now came up in custody, after he had been committed by a magistrate on the criminal charge.

Lawrence, solicitor, for the bankrupt.—It would be for the benefit of the creditors to allow the bankrupt to surrender. The Courts have allowed bankrupts a *locus penitentiae* in such cases. (*Ex parte Berryman*, 1 Gl. & J. 223; *Ex parte Shiles*, 2 Rose, 381.)

Hilleary, solicitor, contra.—Criminal proceedings have been commenced against the bankrupt for the non-surrender, and he has been committed for trial. It is as if a true bill had been found against him; in that case the Court would not take the surrender. (*Ex parte Levi*, 2 Mont. & Ayr. 685.)

Lawrence, in reply.

Mr. Commissioner FONBLANQUE.—The Legislature has always considered the non-surrender of a bankrupt as a very grave offence—so grave, indeed, as formerly to merit punishment of death. This extreme severity of the law has been from time to time relaxed, and now the punishment is reduced to transportation for seven years; for experience has shown that extreme penalties stand in the way of and prevent prosecutions; but the object of this relaxation of the law would be defeated if, notwithstanding the reduction of the punishment, the Courts should interpose difficulties in the way of prosecutions. The early rule under which the Courts would allow the bankrupt to surrender, after the proper day had passed, is laid down in *Ex parte Higginson*, 12 Ves. 496. There the Lord Chancellor said, “If by an innocent default of the bankrupt he has neglected to surrender himself on the day appointed, the Lord Chancellor may, upon petition,

make an order that the Commissioners be at liberty to appoint a new day for taking the examination." And again, "But such order giving a bankrupt leave to surrender after the time prescribed by Act of Parliament is not mandatory upon him, and gives him no protection except so far as it may show the favourable inclination of the Lord Chancellor, and by not surrendering he does not incur a contempt; such order, however, would not protect him from a prosecution." (*Ex parte Johnson*, 14 Ves. 40; *Ex parte Jackson*, 15 Ves. 19.) Subsequent cases have gone on these principles—physical impediments, misadvice, and misconception, were considered as mitigatory circumstances, under which favour would be shown to the bankrupt. At first the cases went to this, that the order to allow the surrender was never made when the assignees opposed. This rule was first broken into in *Ex parte Shiles*; but the report of that case is very short, and no reason has been assigned for the decision; so that I am at a loss to know how far I am to consider that case as an authority. The order has since then been very easily obtained. I cannot tell why; for I shall consider that in proportion to the diminution of the punishment, and the increased facilities for committing the offence of absconding, the dispensing power should be more rarely exercised. But it was always discretionary in the Commissioners to receive the surrender or not, on account of their greater knowledge of the facts. In this Court, on a former occasion, where a bankrupt had absconded and taken away money, and remained away a considerable time, I refused to receive the surrender, notwithstanding the order of the Court of Review giving me liberty to do so. Now, looking at this case, it does not appear, from what has been shown on the bankrupt's behalf, that there are any circumstances to entitle him to the favourable consideration of the Court. Could a man in the same position of life as the bankrupt (a stockbroker) have been ignorant of the consequences which would of necessity follow his absconding? I cannot think so. He must have known, when he left his place of

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business and went abroad, that he committed an act of bankruptcy, and that a fiat would follow. I must therefore consider the act of bankruptcy as wilful ; and I am of the same opinion as to the non-surrender ; and there is this additional reason to lead me to that conclusion ; namely, that there is nothing to show that the bankrupt would ever have willingly surrendered. It must be borne in mind that he is here in custody on the criminal offence, and that a prosecution has actually been commenced. And I know of no case where the Courts have interposed favourably to a bankrupt under such circumstances. As to the excuse of ill-health, there is no evidence of that. Such a statement should be borne out by some testimony, at least that of a medical certificate ; and even then it ought to be made to appear that the illness was of an exceedingly grave character. On a careful review of the case, I can see no reason for indulgence. If the prosecution were malicious, there would be a legal mode of preventing its success, by impounding the proceedings, as in former cases the Lord Chancellors have said they would do where they were of opinion that they could have recommended a pardon. This is not a case of accident, ignorance, misadvice, or unavoidable misfortune, or of any circumstance under which, as I believe, the Lord Chancellor would advise a pardon. I must, therefore, dismiss the petition.

Notice of motion, by way of appeal, before the Vice-Chancellor acting in bankruptcy, has been served on the proper parties, and the Court has made an order as of course for the messenger to attend that court with the proceedings on the day of hearing.

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*Ex parte FOLKER, re SHEWARD.**Wednesday,
December 19th.*

LUCAS (counsel) tendered a proof of debt for 1,284*l.* and asked leave to increase the proof to 1,840*l.* by giving verbal evidence of the contents of a written document under the following circumstances:—The person seeking to prove, a Mrs. Folker, had for some years been in the habit of advancing sums of money to the bankrupt, and the bankrupt always wrote the sums lent in a book, which was kept by Mrs. Folker, she being unable to read or write more than her own name. It had been proved on a former occasion that Mrs. Folker having shown the book to a neighbour of the name of Robertson, he told her the account was not rightly headed, and she thereupon gave him the book to take to the bankrupt to be altered; that the bankrupt had kept the book, and, under the pretence of having lost it, refused ever after to produce it.

Proof of debt;
Suppressed
document;
Secondary evidence.

Lucas (counsel for Mrs. Folker) applied that the evidence of Robertson as to the contents of the book, and that of Mrs. Folker, to whom Robertson had read the total amount therein contained, might be received as evidence of the sums lent by Mrs. Folker to the bankrupt, so far as regarded the difference between 1,840*l.* and 1,284*l.* Mrs. Folker having cheques to vouch the latter amount. He cited *Roe dem. Haldane v. Harvey*, 4 Burr. 2584; *Annesley v. Earl of Anglesey*, 17 Howell St. Tr. 1430; *Armory v. Delamcerie*, 1 Str. 504; *Clunes v. Pezzey*, 1 Camp. 8; *Mortimer v. Cradwick*, 7 Jur. 45; and *Haydon v. Hayward*, 1 Camp. 180.

Mr. Commissioner FONBLANQUE.—Let the proof stand at present for 1,284*l.* with liberty to augment it, and to produce secondary evidence of the entries contained in the missing book in support of the augmented proof.

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(Before Mr. Commissioner EVANS.)

*Thursday,
December 20th.*

ANONYMOUS.

Trader debtor ;
Summons ;
Practice.

IN this case *Lawrence*, solicitor for the summoned creditor, objected that the summons was irregular, and ought to be dismissed, inasmuch that it was not in form required by the new Act, sec. 78, and Sched. G. The heading "Bankrupt Law Consolidation Act, 1849," was omitted.

Willes, contra.

The COURT held that the summons was bad. There is a form for such summonses set forth in the statute, which ought to have been followed. The summons was dismissed.

*Thursday,
December 6th.**Ex parte* HEATHCOAT, *re* MULLEN.Equitable
mortgage ;
Further ad-
vances ; Fix-
tures on mort-
gaged pre-
mises.

Held, that an equitable mortgage may be held by the mortgagee as security for subsequent advances by way of loan.

Tenant's fix-
tures pass to
mortgagee.
Special order.

THE petition stated that in the month of August, 1841, the petitioner and his partner Brewin advanced, by way of loan to the bankrupt, the sum of 1,000*l.* for five years, at 5*l.* per cent. on the security of a promissory note for the sum of 1,000*l.* and interest, dated the 1st day of September, and payable on demand to John Heathcoat (the petitioner) and Co. ; and the several securities set forth in the following letter addressed to the petitioner's agent :—

"Sir,—John Heathcoat, Esq., having advanced me one thousand pounds, on loan, for five years, at five per cent. interest, I herewith deposit in your hands, as security for the repayment of the money, the lease of my house, No. 11, Ironmonger-lane, and also a policy of assurance on my life

for one thousand pounds in the Westminster Insurance Office ; the interest of the money to be paid quarterly.

“ I am, Sir, &c.

“ J. MULLEN ” (the Bankrupt).

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In November, 1843, the petitioner and his partner lent to the bankrupt further sums, amounting to 500*l.* at five per cent. on the securities which are set forth in the following letter, addressed to the petitioner:—

“ Dear Sir,—I hereby acknowledge to have received five hundred pounds from you on loan, at interest of 5*l.* per cent. ; as a security for which I deposit in your hands my own promissory note on demand, a policy for 500*l.* on my own life, and the lease of my house and land at Woodford.

“ I remain, &c. &c.

“ J. MULLEN.”

“ Nov. 29, 1843.”

This lease has been disposed of, and the petitioner or his partner claims no interest thereon. In June, 1847, a further advance by way of loan was made by the petitioner and partner to the bankrupt of 600*l.* on the security of a banker's cheque. Notice was given to the several insurance companies of the deposit of the several policies respectively. In the following July the bankrupt deposited with the petitioner and his partner, as a further security for the several advances and interest, two fire insurance policies on the premises in Ironmonger-lane, which have since been dropped. The joint affidavit of the petitioner and his agent states, amongst other things, that they verily believe, before the time of making the last deposit, it had been agreed between the bankrupt and the petitioner and his partner, that the lease of the house in Ironmonger-lane and the policies should be held by the petitioner and his partner as security for the whole of the advances and interest. The whole of the

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Ex parte
HEATHCOAT,
re
MULLEN.

advances are unpaid, and no interest thereon has been paid since December, 1846. The petitioners have paid the several sums of 32*l.* 5*s.*, 32*l.* 5*s.* and 15*l.* for continuing the said policies. The bankrupt, in August last, without the consent of the petitioner or his partner, procured a new lease of the premises in Ironmonger-lane, in substitution of the lease deposited with the petitioner.

Notice of motion, to the effect following, was served on the assignees:—Take notice, that the Court will be moved on Tuesday, the 4th of December, &c. on behalf of the petitioner and his partner, claiming to be equitable mortgagees of the bankrupt's lease of the premises in Ironmonger-lane, and of the tenant's fixtures therein, and of a policy of assurance for 1,000*l.* on the life of the bankrupt, and of another policy for 500*l.* on the life of the bankrupt, to the intent that the petitioner and his partner might be declared to be equitable mortgagees of the lease, fixtures, and policies, and that their accounts might be taken, and that the assignees might be directed to take up a new lease of the premises in Ironmonger-lane, and that the same might be deposited with the petitioner and his partner in place of the old lease, and that the petitioner and his partner might be declared to have the same rights, &c. in respect of the new lease as they had in the old lease; and that such lease, fixtures, and policies might be sold, and the moneys to arise from such sale be applied in the usual manner.

Lucas, counsel, for the petitioner.—The equitable mortgage of the lease and fixtures may be extended by parol to cover the further advances. (*Ex parte Withead*, 19 Ves. 260—479; *Ex parte Langton*, 17 Ves. 227; *Ex parte Kensington*, 2 Ves. & B. 79; *Ex parte Lloyd*, 1 Glynn & Y. 389; *Ex parte Nettleship*, 2 Mon. Deac. & De G. 124.) We are also entitled to the fixtures. (*Ex parte Broadwood*, Mon. Deac. & De G.; *Ex parte Cotton*, 2 Mon. Deac. & De G.; *Ex parte Reynolds*, Mon. Deac. & De G.)

Bagley, counsel, for the assignees.—We admit all the facts, and do not dispute that the further advances are covered by the equitable mortgages. The only question is, who are entitled to the fixtures?

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HEATHCOAT,
re
MULLEN.

Mr. Commissioner EVANS.—The cases under which trade fixtures do not pass apply only to questions between landlord and tenant. As between mortgagee and mortgagor, all the fixtures pass. The question is, what are fixtures? There must be evidence as to that. (*Ex parte Fortescue, re Mackie*, 1 De Gex, 531.)

Thursday,
December 20th.

Order.

The Court doth order that John Heathcoat and Ambrose Brewin are equitable trustees of the leasehold premises and fixtures comprised in the leases of the 24th June, 1841, and the 24th August, 1849, and of the policies of insurance effected with the Westminster and General Life Assurance Association and the National Provident Institution, and that the said John Heathcoat and Ambrose Brewin should be at liberty to exchange the said lease of the 24th June, 1841, for the new lease dated 24th August, 1849, and to pay the costs of preparing such lease; and that the said John Heathcoat and Ambrose Brewin shall thereupon have and be entitled to the same rights and remedies in respect of such new lease as they had in respect of such original lease; and I find that there is justly due and owing to them, the said John Heathcoat and Ambrose Brewin, the sum of 2,461*l.* 10*s.* 10*d.* for principal money lent and advanced by them to the said bankrupt and insolvent thereon up to the 27th of October last, secured by the deposit of the said lease of 24th of June, 1841, and the said policies of assurance as aforesaid; and I order that the said leasehold premises and fixtures and the said policies of assurance be sold by public auction, at the Auction Mart, in the City of London, under the direction of the as-

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re
MULLEN.

signees, on the 8th day of January, 1850, and that notice of such sale be advertised in the *Gazette*, and in the *Times*, *Morning Chronicle*, and *Morning Advertiser* newspapers; and that the said John Heathcoat and Ambrose Brewin, or one of them, by themselves or himself, or by their or his agents or agent, be at liberty to bid at such sale for the purchase of the said leasehold premises and fixtures, or any part thereof; and that the said assignees of the said bankrupt's estate, and the said John Heathcoat and Ambrose Brewin, shall join in and concur in the conveyance or assignment of the said lease and premises and fixtures, and the said policies, to the purchaser or purchasers thereof; and that the moneys to arise from such sale be applied in the usual manner; that is to say, first in discharge of the costs and expenses of and incidental to such sale, to be taxed by the Master of the Court, and of the conveyance and assignment as aforesaid, and next in discharge, or towards payment of the said debt and interest so due to the said John Heathcoat and Ambrose Brewin as aforesaid; and that the surplus, if any, of the said moneys to arise as aforesaid be paid over to the official assignee of the said bankrupt; but if the said moneys so to arise from such sale (subject as aforesaid) shall be insufficient to pay the said John Heathcoat and Ambrose Brewin the amount of their said debt and interest so due to them, it is further ordered, that the said John Heathcoat and Ambrose Brewin be at liberty to go in under the said petition and prove for the deficiency, and receive a dividend or dividends thereon, and rateably and in equal proportions with the other creditors of the same bankrupts seeking relief under the said petition.

1849.

(Before Mr. Commissioner FONBLANQUE—sitting for the Senior Commissioner.)

Ex parte SUTTON AND ASH, *re* JOHN COWLISHAW AND
JAMES COWLISHAW.

Wednesday,
December 5th.

THIS was a petition for impounding a petition and separate adjudication of bankruptcy against John Cowlishaw, who carried on business in copartnership with James Cowlishaw, under which Bittleston was appointed official assignee; and also for impounding a subsequent petition by the petitioner, under which the said James Cowlishaw was adjudicated a bankrupt, which petition has not been proceeded with. Subsequent to the last-mentioned adjudication, the petitioners presented a further petition, praying a joint adjudication against the said John Cowlishaw and James Cowlishaw, under which they were jointly adjudicated bankrupts.

Practice;
Bankrupt Law
Consolidation
Act, sec. 90;
Petition to im-
pound separate
fiats, and adju-
dications
against part-
ners; Petition
for joint adjudi-
cation; Form
of order; Sepa-
rate adjudica-
tion against
partners im-
pounded re-
spectively;
Costs.

The petitioners are creditors to the joint estate, which is of considerable value, and the separate estate is of small value. The petition prayed that the separate petitions and adjudications might be impounded, and the costs paid out of the joint estate; and that all further proceedings under such petitions might be stayed; that if the official assignee should have possessed himself of any of the assets of the said John Cowlishaw, he might be directed by the Court to act for the same under the joint adjudication.

Ayrton, for the petitioners.

H. Sargent, for the petitioning creditor, for the separate adjudication against John Cowlishaw, and for the official assignees under the same.

His HONOUR was pleased to make the following order:—
Let the petition for a separate adjudication against John

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Ex parte
 SUTTON & ASH,
re
 JOHN
 COWLISHAW &
 JAMES
 COWLISHAW.

Cowlishaw, and the proceedings thereunder, and the petition for a separate adjudication against James Cowlishaw, be impounded ; and the costs for the separate adjudication against the said John Cowlishaw, and of prosecuting, making, working, and impounding the same, and the proceedings thereunder, be paid out of the separate estate of the said John Cowlishaw ; and if such separate estate shall prove deficient, then that the same costs be paid out of the joint estate ; and let the costs of the said petition for separate adjudication, and the costs, &c. &c. be paid out of the separate estate of the same James Cowlishaw ; and if such separate estate shall prove deficient, then that the same costs be paid out of the joint estate ; and that the costs of this application be paid out of the joint estate ; and let it be referred to the proper officer to tax all such costs, as between solicitor and client ; and let the said petitions for separate adjudications and proceedings be forthwith brought into and deposited in the office of the chief registrar of this court, not to be produced without the order of this Court ; and let all further proceedings, and the same petitions, or either of them, be forthwith stayed ; and if the official assignee under the said separate adjudication has possessed himself of any moneys and effects of the said John Cowlishaw under the same adjudication, let him account for the same before the Court, under the joint adjudication against John Cowlishaw and James Cowlishaw.

1850.

(Before Mr. Commissioner FANE.)

ANONYMOUS.

Friday,
February 15th.

Trader debtor ;
 Summons ;
 Subsequent arrangement ;
 Protection from process ; Costs.

A TRADER DEBTOR summons had issued against A.B. ; afterwards, and subsequent to the summons having been duly

A trader debtor summons is avoided by a protection granted under the trader debtor arrangement sections.

But in such case he must pay all the costs prior to the time when notice of his petition and meeting was served on the creditors.

served on him, A. B. filed a petition under the trader-debtor arrangement sections, and obtained protection till 26th inst., the day of the first meeting ; on this day cause was shown against the summons.

1850.

ANONYMOUS.

Lucas, counsel, for A. B.—We are protected by sec. 211 from all process against person and property. The summons is a process, or, at all events, initiative of, and might lead to process being issued against the person or property of A. B. and as such cannot now be sustained.

Langham, solicitor, contra.

Mr. Commissioner FANE.—A. B. is protected against all process ; the summons must not be proceeded with.

An application for costs was made by *Langham*.

Lucas, contra.—The creditor has failed. He is not entitled to costs. A. B. ought not to be liable to costs for doing his duty, viz. coming here to have his property distributed. He has given up everything he possessed for the benefit of his creditors, so he has nothing wherewith to pay costs ; at all events, the estate only ought to be charged ; but in that case, as no assignee has been appointed, there is no one against whom an order charging the estate with costs can be made.

Mr. Commissioner FANE.—He must pay all the costs prior to the time when notice of his petition and meeting was served on the creditors. (See sec. 213.)

1850.

(Before Mr. Commissioner FONBLANQUE.)

Re CHISHOLM AND CHISHOLM.

Double sitting;
Costs.

The costs of
double sittings
will not be al-
lowed in public
meetings.

THIS matter occupied the Court for three hours and upwards.

Wilkinson, solicitor, for the assignees, applied to be allowed to charge for a double sitting: he had two clerks in attendance.

The COMMISSIONER.—I will not allow double sittings for public meetings. You may make extra charges for clerks.

(Before Mr. Commissioner FONBLANQUE.)

Re WOOLSEY.

Tuesday,
February 19th.

Costs.

Costs of
double sittings
in public meet-
ings will not be
allowed.

THIS was a meeting for the choice of assignees. The bankrupt was examined touching certain money alleged to be in his possession. Upon his refusing to make answer, and to sign and subscribe his examination, he was committed to the Queen's Prison.

Lawrance, solicitor, for the petitioning creditor, applied to be allowed costs for bringing the original solicitor for the estate up from the country, on the ground that the information that he had supplied was useful for the purposes of the examination, and beneficial to the estate. He also applied to be allowed costs of a double sitting.

Mr. Commissioner FONBLANQUE.—Under the peculiar circumstances of this case, I will allow the expenses of the country solicitor; but it is not the general practice to do so:

the rule is rather the other way. I cannot allow costs for double sittings in respect of public meetings ; you must take one with the other. It would be well to inform the bankrupt that the effect of his conduct will not end in the committal, but it will be taken into consideration again when he comes up for his certificate.

1850.

Re
WOOLSEY.

ANONYMOUS.

Wednesday,
February 20th.

IN this case the person against whom the petition had been filed had only been in trade for a period of ten weeks. It was therefore impossible to state, according to the printed form of petition prescribed by the statute, that he had carried on business for six months immediately preceding the date of the petition, within the district of the Court within which the petition was filed.

Petition ;
Trading ; Sec.
90.

Where a trader, against whom a petition for adjudication has been filed, had only been in trade ten weeks, the form of petition in the statute may be altered according to the fact.

Mr. Commissioner FONBLANQUE. — Unless the form is altered to meet the exigence of the case, a trader would be exempted from the operation of the bankrupt law until he has traded for six months. This is not the policy of the law, and cannot have been the intention of the Legislature. Let the form of the petition be altered according to the facts.

(Before Mr. Commissioner EVANS.)

Ex parte SPARKES, *re* GEERING.

Tuesday,
March 12th.

THE facts will appear in the judgment.

Right of assignees to re-

tain damages recovered by them in respect of an injury done to the bankrupt through the dishonour of his acceptance, against the holders of the bills.

G. paid a sum of money into his bankers', with notice to them to apply the same in payment of certain of his acceptances, then about to become due ; the bankers retained the money, and suffered the bills to be dishonoured. G. afterwards became bankrupt, and his assignees brought an action against the bank for the injury so done to the bankrupt, and obtained a verdict for a sum equal to the amount due on the bills :

Held, that the assignees were entitled to retain such sum against the holders of the bills, the latter to be allowed to prove.

1850.
 ———
Ex parte
 SPARKES,
re
 GEERING.

Lawrance, solicitor, for Messrs. Sparks (the holders of the bills).—There is no privity between Messrs. Sparks and the bank, therefore we cannot recover from them at law. We contend that the sum paid into the bank by Geering was for a specific purpose, and for our benefit. It was in the nature of a trust, and we are entitled to it in equity.

Linklater, solicitor, for the assignees.

Wilkinson, for the bank.

Judgment.

Mr. Commissioner EVANS.—In this case, Messrs. Sparks and Co. had taken an acceptance from the bankrupt for the sum of 175*l.* 2*s.* 3*d.* for goods sold and delivered to him by them. When the bill was nearly due, the bankrupt stated to Messrs. Sparks that he had not sufficient money to enable him to pay the bill unless they would lend him 50*l.*; they lent him the 50*l.* and he paid into his bankers' a sufficient sum to pay the bills, giving them notice to do so. The bankers allowed the bills to be dishonoured.^(a) After the bankruptcy of Geering, his assignees sued the bank for their failure to pay the bill for 175*l.* 2*s.* 3*d.* and a verdict was given in favour of the assignees for the sum of 175*l.* 2*s.* 3*d.* It has been contended, on the part of Messrs. Sparks, that the assignees ought to pay over to them the amount of the damages, less the costs of suit, and the following cases were relied on:—*Left v. Morris*, 10 Sim. 607; *Burn v. Carvalho*, 10 Myl. & Cr. 690; *Malcolm v. Scott*, 6 Hare, 57; *Ex parte Hobhouse*, 2 Dea. 291. In all these cases the assignees of the bankrupts had property in their hands in trust to discharge certain bills of exchange; the holders of the bills of exchange, though there was no privity between them and the bankrupts, were held entitled to it, because otherwise persons would be

(a) The bankers retained the sum deposited with them for the payment of the bills, in respect of a larger sum which was then due to them from the bankrupts.

enabled to get it, and the disposal of it to the holders of the bills was a relief to that extent of the bankrupt's estate. This was the ground of the decision in *Ex parte Waring*, 19 Ves. 345, on which all the cases cited are founded. In the present case the assignees were not in possession of a property in which Messrs. Sparks had an interest; the jury might have given one farthing or 10,000*l.*; the action was not for an injury done to Messrs. Sparks; and I am of opinion that those gentlemen are not entitled, either in law or equity, to the amount in question. Of course their proof will be allowed.^(a)

1850.

Ex parte
SPARKES,
re
GEERING.

(Before Mr. Commissioner FONBLANQUE.)

Ex parte DENDY AND OTHERS, *in re* CHISHOLM.

Tuesday,
March 19th.

THE following are the facts stated in the petition:—That, previous to the bankruptcy, the petitioners were mortgagees, amongst other premises, of the fee-simple of the Dorking Waterworks, and of a messuage and grounds adjoining, subject to a prior mortgage to one Kerrick. On the 15th of June, 1848, the petitioners, with the consent of Kerrick, caused the premises referred to, with others, to be put up for sale by auction, subject to certain conditions of sale. The third of such conditions was in the following words:—"That every purchaser shall, immediately after the sale, pay a de-

Uncompleted contract; Power of the Court to order assignees to elect; Whether a conveyance is a deed or an escrow; Contract to be voided on both sides.

The bankrupt, previous to the bankruptcy, entered into a contract for the purchase of land, which he failed to perform. A subsequent arrangement for the purchase was entered into.

(a) See *Lord Braybrook v. Meredith*, 13 Sym. 271; *Parsons v. Middleton*, 6 Hare, 261; *Hassel v. Smythers*, 12 Ves. 121; *Ex parte Parr*, Buck. 191; *Ex parte Prescott*,

Mont. & Ayr. 316. As to want of privity, see *Hill v. Smith*, 12 M. & W. 818; *Alder v. Reighley*, 15 M. & W. 117.

to, and a draft conveyance was delivered to the vendor, containing recitals that part of the purchase-money was paid. The money, in fact, was not paid. A sum of money was paid to the vendor in part payment of a forfeited deposit:

Held, that the conveyance was an escrow, and not a completed assignment; and that the assignees ought to elect to complete or not: if not, mutual credit to be given for all sums paid and received respectively; the contract to be void *ab initio*.

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—
Ex parte
DENDY
and OTHERS,
re
CHISHOLM.

posit in the proportion of 20*l.* for every 100*l.* of his purchase-money, into the hands of Mr. Wm. Ley, the vendors' solicitor, and sign an agreement for payment of the remainder on the 29th day of September next, at the office of Wm. Ley, at No. 3, Bream's-buildings, Chancery-lane, London, at which time and place the purchases are to be completed, and purchasers to be let into actual possession, or into the receipt of the rents and profits of the respective lots, up to which time all outgoings as to such part of the property as shall be in hand, and all outgoings payable by the landlord, of such part thereof as shall not be in hand, will be discharged by the vendors; and if from any cause whatever any purchase shall not be completed on that day, the purchaser shall pay interest on the unpaid portion of his purchase-money, and on the valuation mentioned in these conditions, at the rate of 5*l.* per cent. per annum until completion." The fourteenth condition was as follows:—"That if any purchaser shall neglect or fail to comply with the above conditions, his deposit shall be thereupon actually forfeited to the vendors, who shall be at full liberty to resell the lots purchased by such person, and either by public auction or private contract, at such time and place, subject to such conditions, and in such manner as the vendors shall think fit, and the deficiency in price (if any) which shall happen on such second sale, and all expenses attending the same, shall immediately after the same be made good and paid to the vendors by the defaulter at this present sale; and in case of nonpayment, the whole or such part of the same as shall not be paid shall be recoverable by the vendors as and for liquidated damages." At the sale, the bankrupt, William Chisholm, became the purchaser of the premises comprised in lot 1, comprising the waterworks, for the price of 4,020*l.*, but, being unable to pay the deposit, signed a contract for his purchase, written at the foot of a printed copy of the conditions of sale, and gave the vendors a promissory note for 804*l.* engaging to pay the same and the residue of the purchase-money on the day and in the manner

set forth in the third condition of sale. The petitioners *in all respects* performed the conditions of sale. The said bankrupt did not perform his agreement to pay the promissory note and purchase-money, but in the draft of the conveyance by his solicitor to the solicitor for the petitioners, about the 29th of September, it was recited, that Kerrick had agreed to allow the sum of 3,000*l.* to remain on mortgage of the water-works ; and it was witnessed that, in consideration of 600*l.* expressed to be paid by the said bankrupt to Kerrick, and of 520*l.* to be paid to the petitioners, the premises were conveyed to the said bankrupt, subject to Kerrick's mortgage.

The said bankrupt did not complete his purchase, and was adjudicated a bankrupt on the 20th of November, 1849, and assignees were chosen under the bankruptcy, but 300*l.* was paid to the petitioners in part payment of the deposit, and the petitioners paid Kerrick all that was due to him in respect of his mortgage, except the 3,000*l.*

The prayer was, that the assignees might be forthwith ordered to elect whether they would abide by and execute the agreement of the said bankrupt, or abandon the same ; and if they should elect to execute the same, that they might be ordered forthwith so to do ; and if they should elect to abandon the same, that they might be ordered forthwith to deliver up the agreements, if any, in their possession, and also possession of the said premises, and may be ordered to pay the petitioners all rates and rents received by them for or in respect of the said premises since the said bankruptcy, and that the petitioners might be at liberty to retain the said sum of 300*l.* paid in, part of the said deposit as aforesaid, and for the further order of the Court.

Bagshawe, counsel, for the petitioner.—Is this a complete assignment or not ? and are we to consider the instrument produced as a deed or an escrow ? It is conceded that the recital in the conveyance of the 29th September is not true ; it could not have been intended that the bankrupt should

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have possession of the deed except until the consideration-money should have been paid. The contract was not delivered over, nor would it be until the conditions contained in it should have been performed by the purchaser. This instrument must be considered an escrow, and not a complete conveyance. (*Bowker v. Burdaker.*) No legal estate has actually passed. Kerrick, in whom the legal estate resides, is not a conveying party. Neither, under the circumstances, has any equity passed to the bankrupt or his assignees. But we have a lien on the land for the unpaid purchase-money, therefore the premises cannot be considered to belong to the general estate. The conveyance is as yet incomplete, and the assignees ought to elect whether they will complete or not.

Stevens, solicitor, for the assignees.—The vendor is in the common case of a vendor who has not received his purchase-money—he is now in the condition of an equitable mortgagee. The petition is inconsistent; it prays that the contract may be delivered up, but that the petitioners are to retain the benefit of it. If the contract is voided, it must be voided altogether, and the condition for forfeiture of deposit must be given up with the rest. If the assignees are to account for the rents, rates, &c. they ought to be allowed to take credit for the paid portion of the purchase-money. That would restore the parties to their original rights.

Mr. Commissioner FONBLANQUE.—I consider this conveyance an uncompleted contract, within the meaning of the statute, (a) sec. 146. And the assignees are bound to elect

(a) That if any bankrupt shall have entered into any agreement for the purchase of any estate or interest in land, the vendor thereof, or any person claiming under him, if the assignees shall not (upon being thereto required) elect whether they will abide by and execute such

agreement, or abandon the same, may apply to the Court, and the Court may thereupon order them to deliver up the agreement and the possession of the premises to the vendor or person claiming under him, or make such order therein as the Court shall think fit.

as to whether they will abandon or execute the agreement within a reasonable time. An account ought to be taken of the rent and rates received by the bankrupt or his assignees, giving credit for all outgoings, and the 300*l.* paid to the petitioners may be set off against the rent and rates, the balance, if any, to be paid to the parties entitled. The assignees are entitled to be allowed all reasonable expenses incurred in keeping up the works. I will make no order as to costs.

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—
Ex parte
DENDY
and OTHERS,
re
CHISHOLM.

Re HART.

THE assignees originally chosen under this bankruptcy had been removed, and this was the meeting appointed for the choice of assignees.

A creditor voted for the choice of certain persons alleged to be friendly to the bankrupt.

Lewis, solicitor, for certain creditors who objected to the choice of the persons proposed as assignees.—This creditor has assigned his debt, and therefore is not entitled to vote.

Sturgeon, counsel, *contra*.

Mr. Commissioner FONBLANQUE.—The debt is, in fact, not assignable. The creditor whose proof is on the proceedings must be considered a creditor for the purpose of the bankruptcy, unless his proof be expunged, notwithstanding any transaction with third persons. He is entitled to vote.

A person claimed to vote for a creditor under a power of attorney, given by a creditor to appear before the Commissioner, &c. at the time appointed in the *London Gazette*, or at any adjourned or other meeting for the choice of assignees, &c.

A creditor who has assigned his debt may vote in the choice of assignees; Power of attorney to vote on choice extinct when once executed.

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Re HART.

Lewis.—This power was executed at the first meeting for the choice of assignees, it is now extinguished.

Sturgeon, contra.—I rely on the words of the power, “at any adjourned or other meeting.” The power is general, and not extinguished; though it was used at the first choice, that choice has been made void, and the power exists as if no choice had hitherto taken place.

Mr. Commissioner FONBLANQUE.—I am of opinion that, the power having been once executed, is extinguished. The words relied on by counsel do not bear the interpretation put on them by him,—they may be satisfied in another way. The sitting for the original choice might have been dropped, then the power would have still existed up to the choice; that must be taken to be the construction of the words, and the attorney cannot now be permitted to vote.

Re ———.

Bankrupt is not to be examined as to his moral conduct.

THIS was a private sitting to inquire into the estate and effects of the bankrupt.

Among other things, the bankrupt was examined as to his moral conduct.

The bankrupt declined to answer.

The matter was referred to the Commissioner.

Lucas, counsel, for the bankrupt.

Mr. Commissioner FONBLANQUE.—I cannot allow such questions to be put, unless it can be clearly shown that the answers would disclose something relating to the disposition of property.

1850.

(Before Mr. Commissioner GOULBURN.)

ANONYMOUS.

*Monday,
January 28th.*

THIS was an application under sec. 160, for the allowance Costs.
out of the estate of the bankrupt of the expenses of the
preparation of the balance-sheet by an accountant.

Mr. Commissioner GOULBURN.—Before I can make such allowance as asked for, I must consider the state of the accounts at the time of the bankruptcy. If the bankrupt has failed to keep proper books, I will not permit the estate to be put to expense for doing that which the bankrupt was bound to have done himself. But if, on the other hand, the books have been fairly kept, but the transactions in them are of a very voluminous or involved character, I will make such allowance as the trade assignee and the official assignee shall agree upon.

The official assignee reported that the books were well kept, but very involved.

It was then referred to the assignees to settle the sum to be allowed.

Ex parte HASTIE AND HUTCHINSON, *in re*
ALEXANDER AND CO.

THE proof tendered was as follows:—“ Robert Hastie and John Hutchinson, of, &c. copartners, trading under the firm Proof of debt ; Account ; Set-off.
Messrs. H.
and H. claimed to prove for the sum of 5,000*l.* and upwards, upon several acceptances of the bankrupts which had come to their hands, and which were discounted by the Union Bank at their request. The bills, when due, were dishonoured by the bankrupts and paid by Messrs. H. and H. The bankrupts claimed a set-off in respect of 1,854*l.* odd, in respect of two acceptances in the hands of third parties, which had been proved against their estate.
Set-off allowed.

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of Hastie and Hutchinson, being sworn and examined, &c. upon their oaths say, that Leslie Alexander and William Bardgett, the persons against whom this fiat is awarded, &c. were, before the date, &c. of the said fiat, and now are, justly and truly indebted to these deponents in the sum of 5,131*l.* 17*s.* 7*d.*; and these deponents further say, that the said debt, &c. due to these deponents by the said bankrupts, arises in manner after-mentioned, namely, as to 62*l.* 19*s.* 7*d.* on balance of account for goods sold and delivered by these deponents to the said bankrupts, between November 1846 and March 1847; and as to 5,068*l.* 18*s.* the residue thereof, upon and by virtue of four several bills of exchange, hereinafter mentioned, and for interest thereon, to the 12th day of January, 1848, the date of the said fiat, and for which the said sum of 5,031*l.* 17*s.* 7*d.* or any part thereof, these deponents have not, nor hath either of them, received, nor hath any person, by their order, or to these deponents' knowledge and belief, received any satisfaction or security whatever, except the said four bills of exchange; that is to say, a certain bill of exchange, dated the 31st day of May, 1847, and drawn by one Richard Baker upon and accepted by the said bankrupts, for the sum of 1,000*l.* payable three months after date, to the order of the said Richard Baker, and by the said Richard Baker indorsed to these deponents before the same became due, for full value and consideration; and also a certain other bill of exchange, dated the 23rd day of June, 1847, and drawn by these deponents upon and accepted by the said bankrupts, for the sum of 1,200*l.* payable three months after date, to the order of these deponents, for full value and consideration; and also a certain other bill of exchange, dated the 23rd day of June, 1847, and drawn by these deponents upon and accepted by the said bankrupts, for the sum of 800*l.* payable three months after date, to the order of these deponents, for full value and consideration; and also a certain other bill of exchange, dated the 20th day of July, 1847, drawn by the said Richard Baker upon and

accepted by the said bankrupts, for the sum of 2,000*l.* payable three months after date, to the order of the said Richard Baker, and indorsed by the said Richard Baker to these deponents for full value and consideration. And these deponents further say, that the said four bills of exchange were respectively accepted by the said bankrupts, and the said first and last-mentioned thereof were respectively indorsed by the said Richard Baker to these deponents, long before the date and issuing of the said fiat, and before any of the said bills were due or payable. And these deponents further say, that they gave full value and consideration for the said four bills of exchange respectively, by receiving and accepting them from one Henry Baker, before any or either of the said bills was due or payable for and in consideration of their several and respective amounts, and crediting the said Henry Baker in account with the same, the said Henry Baker then and still being indebted to these deponents in a sum exceeding the aggregate amount of the said four bills of exchange. And these deponents further say, that before the said bills of exchange, or any of them, were or was due or payable, these deponents indorsed the said bills respectively; and the said bills, being so indorsed by these deponents, were discounted by the Union Bank of London, at the request of these deponents, and the amount of the said bills of exchange, less the discount, was credited to these deponents in the books of the said Union Bank. And these deponents further say, that when the said four bills of exchange became due and payable respectively, they were dishonoured by the said bankrupts, as acceptors thereof; and that after the said bills were so dishonoured by the said bankrupts, these deponents, as indorsees, were called upon to pay, and did in fact pay, to the said Union Bank of London, as the holders of the said bills, the full amount thereof, with interest to the time of payment, in satisfaction for the said bills of exchange so discounted by the said bank, as aforesaid. And these deponents lastly say, that the three last-mentioned bills of exchange were returned to

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these deponents by the manager of the said Union Bank after the date and issuing of the said fiat, and they (these deponents) now hold the same (as well as the first-mentioned bill of 1,000*l.*) as their own property, and offer to prove for the aggregate amount of the said four bills in their own right, and for their own benefit, and not on behalf of, or for the benefit of, any other person or persons whatsoever."

The payment of the bills by Messrs. Hastie and Hutchinson was by a composition of 15*s.* in the pound.

On the 15th of March, 1849, the proof was admitted, subject to such set-off as the assignees might establish as to 1,854*l.* 10*s.*

The matter now came up on the question of set-off. The claim for set-off arose in respect of two bills of exchange, to the aggregate amount of 1,854*l.* 10*s.* accepted by Messrs. Hastie and Hutchinson, which had been proved against the estate of the bankrupts.

Bagley, counsel, in support of the proof.—The bankrupts are only entitled to claim set-off in respect of the 5*s.* in the pound, which was not paid to the Union Bank. As to the sum of 1,854*l.* 10*s.* it is a debt in *auter droit*, and was not due at the time of the bankruptcy, neither was there mutual credit between Messrs. Hastie and Hutchinson and the bankrupts. Refer to stats. 6 Geo. 4, c. 56; 12 & 13 Vict. c. 106, s. 171; the Stats. of Set-off, 2 Geo. 2, c. 22, s. 13; 8 Geo. 2, c. 24. The following cases are in point:—*Gale v. Luttrell*, 1 Yo. & C. 180; *Harvey v. Wood*, 5 Madd. 459; *Brathwaite v. Coleman*, 4 Nev. & M. 654; *Evans v. Prosser*, 3 Term Rep.; *Leman v. Gorden*, 8 Car. & Pa. 392; *Rose v. Hart*, 8 Taunt. 206; *Boyd v. Mangles*, 16 Mee. & W. 343; *Sampson v. Barton*, 2 Brod. & Bing. 39; 4 Moore, 375; *Rose v. Sims*, 1 B. & Ad. 521; *Young v. M'Dougal*, 1 Deac.

Rees, solicitor, contra.—Proof is equivalent to payment as regards equitable set-off. (*Ex parte Reed*, 1 Gl. & J. 224; *Ex parte Smith*, *re Shiel*, Buck, 492.)

Mr. Commissioner GOULBURN.—I am of opinion that there has been mutual credit. The bankrupts took the bills, and gave full consideration for them. This is one of the cases provided for by the Statutes of Set-off. I must take the accounts between the parties, and ascertain what is due on the balance of account. I find that 15s. in the pound only has been paid on the bills upon which the proof is made. I therefore think that the estate is at liberty to set-off the deficiency of 5s. in the pound which remains unpaid.

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Ex parte
HASTIE and
HUTCHINSON,
re
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and Co.

(Before Mr. Commissioner FONBLANQUE.)

ANONYMOUS.

Wednesday,
January 30th.

SMITH, a solicitor, applied to be allowed costs for a double sitting, which had taken place some time back.

Practice ;
Costs ; Double
sitting.

Mr. Commissioner FONBLANQUE.—All applications for costs of double sittings must be made at the time.

Application refused.

(Before Mr. Commissioner HOLROYD.)

ANONYMOUS.

Tuesday,
January 29th.

A TRADER DEBTOR appeared in obedience to the summons of the Court under seal. Arrangements were pending for an arrangement under sec. 24, book 1, Law Consolidation Act. Six-sevenths of the creditors had consented. The debt was not denied.

Trader debtor
under arrange-
ment.

Aspland, for the trader debtor, applied to have the time allowed by the statute enlarged, in order that the arrange-

1850. ment might be completed ; it would be for the benefit of the creditors.

ANONYMOUS.

Sturgeon, for a dissenting creditor.—If we are precluded by the arrangement having received the sanction of the Court, we are entitled to the remedies given by the statute. Our right to obtain an act of bankruptcy by reason of the process of this Court ought not to be defeated by proceedings out of doors, to which we are strangers.

Mr. Commissioner HOLROYD.—The debt has not been denied ; I am therefore bound to require the summoned debtor to file the admission.

Aspland.—Then he may be made a bankrupt.

Mr. Commissioner HOLROYD.—That may be ; but the creditor has a right to choose his remedy. I cannot defeat him to favour the composition.

Enlargement refused.

(Before Mr. Commissioner FONBLANQUE.)

Tuesday,
February 5th.

Ex parte CHEATHAM, *in re* WOODS AND THOMAS.

Proof of debt ;
Partnership ;
Practice.

Where a proof is disputed, on the grounds that the party tendering it is a partner with the bankrupt, the Court will admit a claim

IN this case a proof for 645*l.* odd, for money advanced, and a further sum for wages, was tendered on behalf of Cheatham, who had been a clerk to the bankrupts.

The proof was opposed, on the grounds that the advances were made in respect of a partnership which existed between Cheatham and the bankrupts, and were in fact contributions to the capital of the firm.

to be converted into a proof at a future day, if no partnership be then established at law.

It appeared that a partnership between Cheatham and the bankrupts had been in contemplation ; it was denied that it had been ever carried into effect.

Lawrance, solicitor, was for the proof.

Linklater, solicitor, contra.

After hearing the evidence of Cheatham and of the bankrupts, and the arguments on both sides,

Mr. Commissioner FONBLANQUE.—I do not think that the evidence I have heard to-day is sufficient to establish the fact of a partnership, though it seems clear that a partnership was contemplated ; but it may hereafter be proved that the partnership was actually established. I shall, therefore, admit the proof tendered as a claim, with liberty to convert it to a proof in six months, provided that within that time no creditor shall have obtained a verdict at law against Cheatham as a partner with the bankrupts.

(Before Mr. Commissioner HOLROYD.)

ANONYMOUS.

IN this case a trader had been summoned for a debt of 100*l.* ; the debt was admitted, with the exception of 16*l.* a disputed discount account. No bond had been ordered, and the time given in the statute had elapsed since the debtor appeared in obedience to the summons.

The summoning creditor now filed a petition, and moved that the debtor might be adjudicated a bankrupt, relying on the payment of the residue.

1850.

Ex parte
CHEATHAM,
re
WOODS and
THOMAS.

Trader-debtor summons ;
Act of bankruptcy.

Where the greater part of the debt is admitted, and an affidavit made that there is a good defence to the residue, not paying or compounding for

the residue in time is not an act of bankruptcy.

1850.

ANONYMOUS.

Mr. Commissioner HOLROYD.—Refer to sec. 82 (a) of the Bankruptcy Law Consolidation Act. The debtor made the necessary deposition that he has a good defence to the disputed part of the debt. In such case his not paying or compounding for the same is not within the terms of the statute. I must dismiss the petition.

(Before Mr. Commissioner FONBLANQUE.)

*Wednesday,
February 6th.*

ANONYMOUS.

Trader debtor ;
Summons ; In-
dorsement.

Summons
must be in-
dorsed with the
name of the so-
licitor or party
suing it out.

THIS was a trader-debtor summons. It was objected on behalf of the party summoned, that a description of the trader debtor not required by the statute and schedule had been added to the proper form ; and that the affidavit in support had not been headed “ In the Court of Bankruptcy,” and that the summons was not indorsed with the name of the solicitor,

(a) That if any such trader so summoned as aforesaid shall, upon his appearance, sign an admission for part only of such demand in the form aforesaid, and shall not make a deposition in the form aforesaid, that he believes he has a good defence upon the merits to the residue of such demand (if required by the Court so to do), and enter into such bond as aforesaid to pay such sum or sums as shall be recovered, together with such costs as shall be given in any such action as aforesaid for the recovery of such residue, then and in such case, if such trader, as to the sum so admitted, shall not within seven days next after the filing of such admission pay or render, and offer to pay, to such creditor the sum so admitted, or secure or compound for the same, to the satisfaction of the creditors as to

the residue of such demand, or shall not, within seven days after personal service of such summons, or within such enlarged time as may be granted to him in that behalf, pay, secure, or compound for the same to the satisfaction of such creditor, or enter into a bond in such sum, and with two sufficient sureties as the Court shall approve of, to pay such sum as shall be recovered in any action which shall have been brought, or shall hereafter be brought for the recovery of the same, together with such costs as shall be given in such action, every such trader shall be deemed to have committed an act of bankruptcy on the eighth day after service of such summons, provided a petition for adjudication of bankruptcy shall be filed against such trader within two months from the filing of such affidavit.

but the affidavit in support was so indorsed by the party who issued it.

1850.

ANONYMOUS.

Mr. Commissioner FONBLANQUE.—The addition of the description of the party summoned is mere surplusage, and does not affect the validity of the summons; it would have been better if the statute had required such a description. The omission in the heading of the affidavit is an informality, but not fatal. The want of the proper indorsement on the summons is fatal. The party summoned has a right to be informed as to whom he ought to apply to settle the claim. The summons must be dismissed, with costs. The affidavit is no part of the summons, and therefore the indorsement on it will not cure the defect in the summons.

Ex parte LEWIS AND OTHERS, *in re* ARBER.

THE petition stated, amongst other things, that on May 5, 1833, Samuel Wright was chosen and appointed assignee of the estate and effects of the bankrupt; that in the balance-sheet of the bankrupt, filed November, 1833, it was estimated that there would be a probable surplus, after payment of 20s. in the pound, of 6,349*l.* 13s. 4d.; that the said Samuel Wright absconded from England, and is now believed to be in America; that no dividend has been paid under the said bankruptcy. The prayer was that Samuel Wright might be discharged from the office of assignee, and for a new choice.

Removal of an assignee; Costs.

Where a petition has been presented to remove an assignee, and there are no assets, the petitioner must pay costs.

Reu., solicitor, for the petitioners.—The affidavit in support is a transcript of the petition.

The COMMISSIONER.—The affidavit is not sufficient as to Wright's absconding. Let the application stand over for a

1850.

—
Ex parte
 LEWIS
 and OTHERS,
in re
 ARBER.

week ; if I am then satisfied that Wright has absconded, I will make the order prayed for. The costs must be paid by the petitioners, and they will be at liberty to prove for them in case any assets shall be got in.

—
 (Before Mr. Commissioner HOLROYD.)

Friday,
February 8th.

Ex parte PALMER, *re* ALLISON.

Renewal of
 protection.

On an application on behalf of a bankrupt for the extension of his protection, the Court will not consider objections arising out of matters foreign to the bankruptcy.

UPON hearing the certificate, the Court was pleased to order that the certificate should be suspended for two years, and to grant protection for three months, to be renewed at the expiration of that time, and from time to time afterwards at similar periods. One of these terms had expired, and the bankrupt now applied for a renewal of the protection.

Lucas, counsel, for the opposing creditors.—We are mortgage creditors ; the mortgaged property has been realised, and there was a deficiency, for which we have proved. We commenced proceedings at law to recover the interest which had accrued and become due on the mortgage debt, and the bankrupt has put in many vexatious pleas to our action, by means of which we have been put to considerable expense. The bankrupt is now carrying on an extensive business, although he has as yet no certificate. Under these circumstances, we submit that there ought to be no further enlargement of the protection.

Lawrance, solicitor, for the bankrupt.—As to the charge against the bankrupt that he is now carrying on trade, he is doing so as the salaried servant of another person, namely, the purchaser of the business and premises from the assignees, who considered that, as he is well acquainted with the trade in question, and well known to the public, his services would be valuable. There has been an intention that the business

should be carried on partly in the bankrupt's name, but that intention has not been carried into effect.

1850.

Ex parte
PALMER,
re
ALLISON.

Mr. Commissioner HOLROYD.—I must take measures to prevent the bankrupt from entering into trade, and holding out his name to the public as a trader while the certificate is suspended. As to the vexatious pleas, that is a matter which ought not to be brought before this Court now. The opposing creditor has elected to seek his remedy in another place, instead of proving in bankruptcy; and I cannot entertain his objection in respect of matters foreign to the bankruptcy; it would have been otherwise if his objection had arisen out of any matter relating to that part of the debt which has been proved. I will extend the protection for two months, on condition that the bankrupt will not permit his name to be used in the trade in question.

(Before Mr. Commissioner FONBLANQUE.)

Re SPARROW.

Tuesday,
February 12th.

THE bankrupt came up on the question of certificate.

Turner, solicitor, for opposing creditors.—The bankrupt's expenses have been excessive, and he has kept no cash-book.

Sturgeon, counsel, for the bankrupt.

Certificate.
No certificate will be granted immediately, where the bankrupt has kept no cash-book.

Mr. Commissioner FONBLANQUE.—I will never grant an immediate certificate to a bankrupt who has failed to keep proper books, and most particularly a cash-book; that is the most important book of all: it tests the accuracy of all the other books, and shows the expenses from day to day. The certificate must be suspended for six months. I will allow protection.

1850. The above judgment was repeated almost *verbatim* in *Re Smith*.

Wednesday,
February 13th.

(Before Mr. Commissioner GOULBURN.)

ANONYMOUS.

Saturday,
February 23rd.

Trader debtor ;
Summons
against part-
ners ; Separate
admissions.

Where a
trader-debtor
summons issues
against a firm,
and the debt is
admitted, each
partner ought
to make a sepa-
rate admission.

THIS was a trader-debtor summons issued against three partners for a partnership debt. The question was, whether each partner should make a separate admission of the debt, or whether the admission of one would be taken for all.

Mr. Commissioner GOULBURN.—On looking at the statute and schedules annexed, I am of opinion that each partner should make a separate admission. Another reason is, that should it ultimately be sought to make these partners bankrupt, a separate act of bankruptcy must be established against each ; that will be best effected by making each liable to pay, and compound on a separate admission.

(Before Mr. Commissioner HOLROYD.)

ANONYMOUS.

Monday,
February 25th.

On a petition
under the
trader-debtor
arrangement
sections
(Bankrupt Law
Consolidation
Act, 1849,
sec. 211, *et seq.*)
the assenting
creditors may
be required to
prove their
debts.

THIS was an application arising out of a petition for arrangement.

Wilkins, solicitor.—I am for two creditors ; one holds a judgment. I am entitled to require that the creditors who consent to the arrangement should prove their debts. The *bona fides* of their claims ought to be established before the other creditors are deprived of their common law rights.

Mr. Commissioner HOLROYD.—The debts must be proved ; but the inquiry must be private. I will sit up-stairs for that purpose.

1850.

ANONYMOUS.

(Before Mr. Commissioner FONBLANQUE.)

Re WEST.

*Tuesday,
February 26th.*

IN this case the petitioning creditor, who was an attorney, applied to be allowed his costs under sec. 114.

Solicitor ;
Petitioning
creditor ; Costs.

Hale, solicitor, for the petitioning creditor.—By the Statute of Gloucester, if a party to a suit be an attorney, and act for himself, and is successful, he is entitled in costs, not only to his disbursements, but to such fair professional charges as he might claim against the other side if he had been employed by a third person, save charges for instructions.

A petition-
ing creditor
who is an at-
torney is only
entitled to
costs out of
pocket.

Walker, a solicitor, *contra*.—Mr. Commissioner Holroyd, in *Re Butterfield*, (a) decided professional charges were not to be allowed, but expenses and money out of pocket may be allowed, subject to the discretion of the Taxing Master.

Mr. Commissioner FONBLANQUE.—I have consulted with Mr. Evans and Mr. Holroyd, and we are unanimously of opinion, that when the petitioning creditor is an attorney, he is only entitled to his expenses, and that he can charge nothing for costs as an attorney.

(a) Not reported, but the Editor has been favoured by a perusal of Mr. Commissioner Holroyd's judgment.

1850.

(Before Mr. Commissioner FANE.)

*Wednesday,
February 27th.**Re RUSHBROOK.*Certificate ;
Assignees op-
posing.When as-
signees may
oppose the cer-
tificate without
giving notice.**T**HE bankrupt came up for his certificate.*Sturgeon*, counsel, for the assignees, opposed.*Duncan*, counsel, for the bankrupt, objected.—The assignees had given no notice of their intention to oppose. (Refer to sec. 198.)

Mr. Commissioner FANE.—It is the duty of the assignees at all times to inform the Court as to the state of the affairs of the bankrupt ; I must hear them now.

Note.—It may be doubted whether this decision would apply to assignees opposing, not in their character of assignees, but on matters personal to themselves. This question was raised by counsel, but was withdrawn.

(Before Mr. Commissioner FONBLANQUE.)

*Wednesday,
March 6th.**Re WOODS AND THOMAS.*Certificate of
the second
class ; Right of
the assignees
to oppose
without giving
notice.^(a)The assignees
have a right**T**HE bankrupts applied for their certificate.*Lawrance*, solicitor, in support.*Linklater*, solicitor, for the assignees.—We are satisfied to oppose the granting of the certificate in respect of any question relating to the estate and effects of the bankrupt, notwithstanding that such opposition may be in respect of the bankrupt's conduct towards an individual creditor who has given no notice of opposition.^(a) Bankrupt Law Consolidation Act, 1849, sec. 198.

with the general conduct of the bankrupts towards us ; the trading has been regular, and the books well kept. There is a complaint by an individual creditor that may affect the general estate, but that creditor has given no notice of opposition ; am I at liberty to go into his case ?

1850.

Re
WOODS
and
THOMAS.

Mr. Commissioner FONBLANQUE.—Every creditor should rely on his own particular case ; but there may be circumstances under which the conduct of a bankrupt towards an individual creditor may affect his general estate and his general conduct as a trader ; in such a case it is the duty of the assignees to oppose the allowance of the certificate in respect of such conduct so far only as it may concern the interest of the general body of creditors.

The case then proceeded.

After hearing both sides,

Mr. Commissioner FONBLANQUE.—The mode of trading pursued by the bankrupts is not impeached. The only objection is that the losses and expenses so far exceed the profits. The trading ought to have been brought to a close sooner. The objections offered by the assignees in respect of the bankrupts' conduct towards one of their creditors at first appeared suspicious ; but that has been explained. The books have been well kept ; and there are many points in the bankrupts' favour that make this case more meritorious than the average number of cases that come before this Court. But I must be careful not to deteriorate the value of first-class certificates by granting them indiscriminately, and as the bankrupts did not wind up their affairs in proper time, I cannot certify that their bankruptcy was caused wholly by unavoidable loss and misfortune ; I will, therefore, allow the certificate immediately, but of the second class.

1850.

Re ELLIOTT.

Solicitor and
client ;
Privilege.

A solicitor is
bound to
answer as to
all matters
confided to him
by his client,
which the
client himself
would be
bound to an-
swer.

A SOLICITOR, under examination, was questioned as to matters relating to the estate of his client, the bankrupt.

The witness submitted that his knowledge of the matter in question arose from a communication made to him by his client, that such communication was privileged, and that he was not bound to answer.

Mr. Commissioner FONBLANQUE.—The privilege is the privilege of the client, not of the solicitor. The bankrupt would himself be bound to make answer as to any matter touching his estate and effects.

(Before Mr. Commissioner FANE.)

Saturday,
February 23rd.

Re CATCHPOLE.

Practice ; Ad-
vertisements.

Where a
trader has peti-
tioned under
the Bankrupt
Law Consolida-
tion Act, sec.
211, *et seq.* and
has failed to
comply with
the provisions
required by the
statute, and
has been adju-
dicated a bank-
rupt, and the
matter has
been adjourned
into open court,
the adjudica-
tion must be
advertised
forthwith.

THE facts are stated below.

JUDGMENT.

The Bankrupt Law Consolidation Act, 1849, has introduced, by a series of clauses, from 211 to 223, a new method of proceeding, called "arrangement between debtors and creditors under the control of the Court of Bankruptcy," under which debtors are at liberty to bring their own cases before the Court in a manner comparatively private. The debtor's insolvency is not to be gazetted in the first instance, and the sittings are to be private. This method of proceeding seems to have been intended as a concession to debtors whose inability to meet their engagements is attributable rather to misfortune than delinquency, and to be founded on the as-

Semble.—A trader declared bankrupt in consequence of failing to make out a case for arrangement under the statute, cannot dispute the adjudication under sec. 104.

1850.

Re
CATCHPOLE.

sumption that the mere fact of a debtor voluntarily coming forward and placing himself and his property at the disposal of the Court is *primā facie* evidence of the debtor having an honest case to lay before the Court, and intending to act honestly by his creditors. The law, however, recognising the possibility of a dishonest debtor assuming the character of an honest man, has provided, by c. 223, that on evidence of dishonesty all privacy shall cease, and that the debtor shall be dealt with as a bankrupt; and it accordingly provides, amongst other things, that if at any time after the filing of a petition for protection, it shall be shown to the satisfaction of the Court, by any creditor, that the debtor has been guilty of any one of certain acts of misconduct there specified, "the Court may adjudge the petitioner a bankrupt, adjourn all further proceedings into the public court, advertise the adjudication, and appoint sittings for choice of assignees and for last examination, as in bankruptcy." One Catchpole presented to the Court a petition for arrangement under these clauses on the 14th day of February, and protection was granted to his person and property on the same day. On the 20th, application was made by a creditor for a sitting to show that the petitioner had contracted a debt without reasonable probability at the time of contract of being able to pay it, which is one of the delinquencies specified in c. 223, and on that application I appointed a sitting for the purpose of such inquiry, and summoned the debtor to attend. He did not attend, and I proceeded to hear the creditor in his absence, and being of opinion, on the inquiry, that the debtor had contracted the debt without reasonable prospect at the time of contract of being able to pay it, I adjudged the petitioner a bankrupt, and adjourned all further proceedings in the matter into the public court. A question, however, has been suggested, whether I ought at once to advertise the bankruptcy or postpone the advertising until a duplicate of the adjudication has been served on the petitioning debtor so adjudged bankrupt, and at least seven days have elapsed from the service of such duplicate,

1850.

Re
CATCHPOLE.

to enable the petitioning debtor to show cause against the adjudication, in accordance with sec. 104 of the late Act, it being suggested, that as by c. 223 the proceedings after adjudication are to be, as the expression in that clause is, "as in bankruptcy," no advertisement ought to take place except in exact accordance with the provisions provided for ordinary bankruptcy by sec. 104. I have carefully considered this question, and I am of opinion that an adjudication under c. 223 is neither within the words nor the spirit of sec. 104. It is clearly not within the spirit, because sec. 104 is founded on the obvious justice of not publicly denouncing a man as a bankrupt without giving him at least an opportunity of showing that he ought not to have been adjudged bankrupt at all. By the law of bankruptcy, adjudication on the application of a petitioning creditor is an *ex parte* proceeding, and although on such *ex parte* proceeding seizure of property might not unreasonably take place, it was thought that the bankruptcy should not be advertised, and hence sec. 104 provides that the alleged bankrupt shall have an opportunity of being heard before being gazetted; but in the proceeding under c. 223 he would be heard, as matter of course, before any adjudication at all, for no commissioner would adjudicate under that clause without appointing a sitting for the purpose of hearing both parties, and causing the petitioning debtor to be summoned; and the petitioning debtor was accordingly summoned in this case. Neither is the present adjudication within the letter of sec. 104, for by that section the alleged bankrupt has seven days given him only for the purpose of showing that "the petitioning creditor's debt, or the trading, or the act of bankruptcy upon which the adjudication has been grounded, are insufficient to support such adjudication." But here the adjudication is not grounded upon any one of those requisites. The want of a petitioning creditor's debt or act of bankruptcy is quite immaterial. No debt or act of bankruptcy is needed, and as to the alleged debtor not being a trader, he at least could never be admitted to show that he was not a trader, for

his petition, under c. 211 and 212 and the Schedule Aa, represents him to be a trader, which must be conclusive against him as by estoppel. On the whole, therefore, I am of opinion that the adjudication must be advertised at once.

1850.

Re
CATCHPOLE.

(Before Mr. Commissioner GOULBURN.)

Re A DISPUTED ADJUDICATION.

Saturday,
March 23rd.

THE acts of bankruptcy relied on were that the trader against whom the petition for adjudication was filed had denied himself to creditors, and that he had absented himself from his usual place of business. Depositions made by the wife and servant as to declarations made by them to creditors were relied on in support of the adjudication.

It was contended, on the other side, that such declarations, not having been made in the presence of the trader, could not be received.

Bagley, for the petitioner.

Lawrance, solicitor, contra.

Disputed adjudication ;
Evidence.

Declarations made by the wife and servant of a trader, made in his absence, are part of the *res gesta*; examinations of the wife and servant as to such declarations may be received in evidence.

Mr. Commissioner GOULBURN.—The question is, can I receive evidence of the denials by the wife and servant of the trader sought to be made a bankrupt? It is a very common error to suppose that such declarations, when made in the absence of a party, are hearsay, and cannot be admitted in evidence. The declaration may be a fact, and then it is evidence. Here the denial is a most material fact, and part of the *res gesta*. The Court ought, therefore, to be informed of its extent, and for that purpose the person who made it must be examined. (1 Ph. on Evidence, 148, 3rd edit.) In *Attorney-General v. Good*, M'Cl. & Yo. 286, it was held that

1850. a denial was part of the *res gesta*, and could not be proved but by the person who made it. That case was nearly parallel to the present, but stronger, for it was a crown case, and the judges would have been careful how they admitted evidence which might fix a party with penalties. Here the denials are facts, which must be combined with the other facts of the case to lead the Court to a correct conclusion. In *Charrington v. Browne*, ~~11~~ Moore, 462, it was held that evidence might be received of the fact of a wife telling a creditor that her husband was out. The same principles were laid down in *Fisher v. Boucher*, 11 Moore; and *Fisher and Another v. Boucher*, 10 Barn. & Cr. 705. My opinion, therefore, is, that the evidence ought to be received.

Adjudication confirmed.

(Before Mr. Commissioner FANE.)

Monday,
April 8th.

Ex parte WILLIAM GOOD AND JOHN GOOD,
re RICHARD GOOD.

Breach of
trust; Lien;
Proof.

THE facts are stated below.

JUDGMENT.

A testator, by his will, dated 1816, gave the onus of his property to his wife for life, remainder to his children, and appointed his son, the

bankrupt, and his widow, executors. The trusts of the will were, *inter alia*, that the executors should carry on the testator's business, retaining therein the sum of 1,200*l*. The bankrupt and his mother carried on business till 1821, when the widow retired from business, and the bankrupt, by deed, admitted that there was a sum of 497*l*. odd in the business, and agreed to pay the widow an annuity, and allow interest on the capital remaining in the business. The adjudication took place in November, 1849:

Held, that the *cestui que trusts* had an equitable charge on the bankrupt's interest under the will for the sum of 497*l*. odd, and that this property under the will ought to be sold, and if insufficient to realise a sufficient sum, that the *cestui que trust* might prove for the residue.

Mr. Commissioner FANE.—This was a petition of two *cestui que trusts* under a will, praying that trust property belonging to the bankrupt under that will might be sold, and that the proceeds might be applied in satisfaction of a demand of 479*l*. 16*s*. 8*d*. which the executors under the will, of whom

the bankrupt himself was one, had against the bankrupt, in respect of a breach of trust committed by him, and that proper persons might prove for such part of the 497*l.* odd, if any, as the sales did not cover, and that if necessary the bankrupt's interest in the proceeds of the proof might also be applied in the same way. The circumstances were these:—The bankrupt was co-executor with his mother and one Davis, under his father's will. The father, by his will, dated in 1816, gave the mass of his property to his wife for life, remainder to his seven children equally; and he appointed his eldest son, the bankrupt, and his widow and Davis, his executors. The father had carried on the business of a stationer for many years; and he directed that the bankrupt should carry it on until the year 1822 for the equal benefit of himself and his mother, retaining in the business a capital of 1,200*l.* stated by the testator to be in it at that time, namely, 1816. In 1821 the father died, and the mother and the bankrupt continued the business. There is no evidence to show that 1,200*l.* or any other sum, was in the business in 1821, but by a deed executed in 1834, between the bankrupt and his mother, he admitted that at that time there was 497*l.* 16*s.* 8*d.* capital in it; and on his mother's retiring from business in 1834, he agreed to pay her an annuity for the good-will, and allow her interest on the 479*l.* 16*s.* 8*d.* In November, 1849, Good became bankrupt. Under these circumstances, it is clear that those who represent the testator's estate are entitled to prove for the 479*l.* 16*s.* 8*d.* But the petition went further, and insisted that the co-trustees had an equitable lien on all the property of the testator still remaining undistributed in which the bankrupt had any beneficial interest, to secure payment of the 497*l.* 16*s.* 8*d.* and that they had a right, as against the bankrupt and his general creditors, to have such equitable lien enforced by selling such beneficial interest, and applying the proceeds in satisfaction, as far as they would go, of their demand for 497*l.* 16*s.* 8*d.* and to prove for the difference, and that they were further entitled to have

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Ex parte
 WILLIAM GOOD
 and
 JOHN GOOD,
vs
 RICHARD GOOD.

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WILLIAM GOOD
and
JOHN GOOD,
re
RICHARD GOOD.

the bankrupt's reversionary interest in such proof, subject to the life interest of his mother, applied in further satisfaction of the demand of the co-executors. These claims are evidently founded on a principle adverse to the spirit of the bankrupt laws, which spirit is, that where a loss is sustained owing to insolvency, all creditors shall share the loss proportionally; for if these alleged rights are conceded, then the co-executors of the bankrupt, who, as between themselves and their *cestui que trusts*, have been guilty of a breach of trust, and are, therefore, liable to their *cestui que trusts*, will, as between themselves and all the other creditors of the bankrupt, get nearly 20s. in the pound, and the other creditors will get next to nothing. I therefore originally looked at these asserted rights with a strong inclination against them; but a careful examination of the authorities has forced me to the conclusion that there is too much authority for them to admit of their being resisted. Formerly the law was in some respects held otherwise. The earliest case I find on the subject is *Ex parte Smith*, Co. Bankrupt Law, 212, decided in 1741, where it was held that a trustee for the bankrupt, being creditor of the bankrupt as such trustee, should prove, but that the dividends on the proof should be invested, and the annual proceeds which were payable to the bankrupt for life under the trust should be paid to his assignees for the general creditors. In *Ex parte Groome*, 1 Atk. 115, heard in 1744, the judge said, "If a husband becomes bankrupt after a breach of payment to trustees, they have always been admitted creditors; but the Court has taken care that the interest of the money shall be paid to the creditors under the commission during the life of the husband." In *Ex parte Smith*, stated in *Priddy v. Rose*, 3 Mer. 106, it was ordered, under similar circumstances, that the dividends, on a proof, should be invested in Government stock, and the annual proceeds of the stock paid to the assignees as part of the estate of the bankrupt. And, in 1789, a similar order was made in the case of *Stratton v. Hale*, 2 Br. C. C. 490. All these decisions seem

consistent with the spirit of the bankrupt laws. But in 1832, in *Ex parte Turpin*, Mont. 443, the Court of Review, founding itself partly on a general principle that a bankrupt's assignees can have no rights higher than those of the bankrupt, and partly on a case of *Ex parte Maister, re Ramsay*, heard in 1816, and cited in *Ex parte Turpin*, Mont. 452, n. determined that the dividends, on a proof, should be invested in Government stock, and that the accruing dividends on the stock should be retained (so far as regarded any interest the bankrupt had) to reinstate the trust fund. Since that time, the same law has been laid down in *Ex parte Smith, re Manning*, 2 Mont. & Ayr. 536 (1836); and in *Ex parte Gonne, re March*, 3 Mont. & Ayr. 166 (1837). The principle upon which the latter cases were decided being that which I have above stated—namely, that the rights of the assignees and creditors of the bankrupt co-trustee cannot be higher than those of the bankrupt himself; and it being assumed as clear Chancery law, that the bankrupt trustee, if not bankrupt, could not have enforced satisfaction of any equitable demand he might have had under the trust against his co-trustees, without first reimbursing the trust estate what it had lost by his breach of trust, it would necessarily follow that the co-trustees would in such case have a similar lien on any other trust funds in their hands belonging to the bankrupt trustee; and accordingly it has been so held, and in very early times, too, it must be admitted. In *Ex parte Mitford* (1784), stated by Sir W. Grant in *Priddy v. Rose*, 3 Mer. 105, a bankrupt had covenanted to pay 6,000*l.* to the trustees of his marriage settlement, and, on the other hand, the trustees were liable to pay him 24*l.* a year, and the dividends of certain stock; and it was ordered in bankruptcy that the trustees should be at liberty to retain the 24*l.* per annum and the dividends on the stock, “towards satisfaction of” the sum due to them from the bankrupt. In *Priddy v. Rose*, Sir William Grant, in 1187, declared, even as against a special assignee of the *cestui que trusts*

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WILLIAM GOOD
and
JOHN GOOD,
re
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 and
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interest, that the trustees could retain. "I apprehend it to be clear," said he, "that the *cestui trust* could not have claimed a benefit under the settlement, without making good his part of it." "Supposing he had become a bankrupt, the trustees would have this equity as against the assignees;" and he cited *Ex parte Mitford*. In *Ex parte Turpin*, Mont. 443, the Chief Judge, giving the judgment of the Court, cites the *dictum* of Sir William Grant in *Mitford v. Mitford*, 9 Ves. 87, p. 100 :—"But is an assignee under a commission placed in a different situation from the bankrupt himself? I have always understood the assignment from the commission, like any other assignment by operation of law, passed his rights precisely in the same condition as he possessed them; they (the assignees) take subject to whatever equity the bankrupt was liable to." And in that case the Court acted on the principle, and also in subsequent cases. In *Ex parte Gonne* (1836), 3 Mont. & Ayr. 166, the Court ordered a sale of another interest which the bankrupt took under the trust, in order that the proceeds might be applied, so far as they would go, in diminishing the sum to be proved, Chief Justice Erskine saying, "This is not, strictly speaking, a lien on the part of the trustees, but an equitable right to withhold, &c. till the 2,100*l*." (the sum in question due by the bankrupt) "is made good;" and in *Ex parte Hardman, re Molineux*, 3 Mont. D. & De Gex, 559 (1844), an order was made by Vice-Chancellor Knight Bruce in exact conformity to the relief asked in this case. Under these circumstances, although I regret that trustees and *cestui que trusts*, who have slept upon a breach of trust for twenty years and upwards, should be rescued from all loss at the expense of all the other creditors, I must declare that the executors under the testator's will have a lien on all the interest which the bankrupt took under that will, and that those interests must be ascertained and sold, and the proceeds be applied in reduction of the sum of 497*l*. 16*s*. 8*d*. and that the executors must be admitted to prove under the bankrupt's estate for the

difference, and that the dividends on the sum to be proved must be invested in Government stock, and that the executors may retain any interest which the bankrupt may have in the accruing dividends until the debt of 497*l.* 16*s.* 8*d.* is fully paid and satisfied.

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Ex parte
WILLIAM GOOD
and
JOHN GOOD,
re
RICHARD GOOD.

(Before Mr. Commissioner FONBLANQUE.)

Ex parte CARTER, *re* CARTER.

Friday,
April 19th.

THE bankrupt was a solicitor, and also carried on the business of a newspaper proprietor, in respect of which he was adjudicated a bankrupt.

Bankrupt's
books; Certi-
ficate.

A solicitor
who enters in-
to trade is
bound to keep
books as a
trader. It is
not sufficient
that he has
kept accounts
after the man-
ner of soli-
citors.

Nias, solicitor for the bankrupt, applied for the certificate. No creditor opposed.

Mr. Commissioner FONBLANQUE.—It appears, on the face of the balance-sheet, that the bankrupt did not keep proper books as a trader.

Nias.—The whole of the estate has not been embarked in the trade. The accounts have been kept after the manner in use amongst solicitors. Most of the items are vouched; other items can be verified by reference to persons who have obtained judgments against the bankrupt. The cause of the bankruptcy is a composition made long ago between the bankrupt and his then creditors, which failed in consequence of some informality in the deed. That may be fairly considered as unavoidable loss and misfortune, and the bankrupt is, entitled to a certificate of the first class.

Mr. Commissioner FONBLANQUE.—There is no cash-book. The existence of a cash-book properly kept is a *sine quā non* for the granting of an immediate certificate. It is not sufficient that such a book may now be made up from the diary; it ought to have been regularly kept. The acts of a

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trader should be such as that he can satisfy his creditors, by inspection of his own books, without referring to other sources of information, such as judgments. Whatever may be the usage of solicitors as to keeping their professional accounts, if they enter into trade, and render themselves liable to the bankrupt laws, they must take care that their accounts of the whole of their estate and effects, from whatever source derived, shall be such as to satisfy their creditors and this Court, if they should have the misfortune to come here, that they have made a full disclosure of their estate. As to the causes of the bankruptcy, the bankrupt was insolvent long ago. The effect of the old composition is, that the old debts have been paid at the expense of the new creditors. The bankrupt's professional experience ought to have shown him the result of his conduct. I cannot consider that the bankruptcy has been caused wholly by unavoidable loss and misfortune. The certificate must be suspended for three months; to be, at the expiration of that time, of the *second* class.

(Before Mr. Commissioner HOLROYD.)

Re ST. ALBANS BANK.

Relation between banker and customer; Duties of bankers; General principles as to the manner in which transactions between banker and customer are viewed by the Court on the question of certificate; Refusal of certificate.

THE facts appear in the judgment.

JUDGMENT.

Mr. Commissioner HOLROYD.—I have now to give judgment in the case of Edward Gibson, and also in the case of George Sturt, on the question of certificate, and herein it is the duty of the Court, having regard in each case to the conformity of the bankrupt to the law of bankruptcy, and to his conduct as a trader, before as well as after his bankruptcy, and whether the allowance of the certificate be opposed by any creditor or not, to judge of any objection against allowing the certificate, and either to find the bankrupt entitled thereto, and allow the same, or to refuse or

suspend the allowance thereof, or to annex such conditions thereto as the justice of the case may require. These cases have undergone the fullest investigation ; the time which was taken up may be regarded as an event almost unparalleled in bankruptcy, and the inquiry was conducted with zeal and ability by the learned counsel and the other advocates for the respective parties. The two cases, though brought before the Court under separate fiats (that of Gibson on the petition of his brother, and that of Sturt on his own petition), are so mixed and interwoven with one another, that I must treat them as one. In this view, then, I have considered the case in all its bearings, and with the anxiety which should govern the Court in every case, and particularly one of such great public importance as the present, both in itself and as a precedent. I say this, not indeed from the magnitude of the bankruptcy,—for, as a banker's case, it is comparatively insignificant, perhaps the smallest that ever came into this court,—but the case involves principles of great moment ; it suggests and forces the consideration of the responsibility and duty of a banker, and of this further most serious question, under what circumstance of failure is a banker entitled at the hands of the Court to a liberation from the claims of all his creditors ?—bearing in mind that the law relating to bankrupts is to be expounded beneficially for creditors, and so as to prevent fraud, and to support good faith and credit in commercial dealings. Not long ago, I heard it stated by a high judicial authority, before a select committee of the House of Lords, on the Bankrupt Law Consolidation Bill,—and the proposition is not one assumed for truth without sufficient warrant—I believe it must receive universal and ready assent,—that “the failure of a banker, unless under very extraordinary circumstances, is a thing not to be contemplated.” And the same noble and learned lord asked the following questions, which were answered unfavourably to the banker by one of my brother Commissioners of this court :—
 “How can a banker, if he is an honest man, and understands

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his business, possibly fail?" "Does not the failure of a banker itself assume that he has been acting dishonestly towards his creditors?" It has also been remarked, in reference to the trade of banking, "When a bank confines itself to its proper business, and does not embark in speculations of unusual hazard, or from which its funds cannot be easily withdrawn in the event of any sudden run or demand, it can hardly ever fail of being in a situation to meet its engagements, whilst the private fortunes that most commonly belong to the partners afford those who deal with it an additional guarantee." It will not be out of place to add an observation of an experienced writer as to the utility of country banks:—"Country banks, established by individuals possessed of adequate funds, and managed with due discretion, are productive of the greatest service. They form commodious reservoirs, where the floating and unemployed capital of the surrounding districts is collected, and from which it is again distributed by way of loan to those who will employ it to the best advantage. It is therefore of the utmost importance, in a public point of view, that these establishments should be based upon solid foundations." I will now consider the position of this banker with regard to his customers, or, as they are sometimes called, the depositors in his bank. The learned counsel (Mr. Bagley), in opening this case, spoke of a banker as being "a trustee for others," and Mr. Linklater cited a portion of an able judgment of my brother Commissioner (Serjeant Goulburn) in support of a similar view; but that part of my brother Goulburn's judgment which was referred to by Mr. Linklater, though apparently general in its application, must be considered, with reference to the particular case before that learned Commissioner, in which the main ground of opposition was "a breach of trust." We must not, however, confound our notion of the situation of a banker in his general dealings, with that of a trustee in a fiduciary character. It is material that we should entertain a correct view upon this point; for although, in the

present case, the judgment itself may not be affected, it is right that the reasons upon which the judgment is given should not be mistaken. "To satisfy the parties, or, at least, to give them such grounds as ought to satisfy reasonable men, is in importance only next to giving them a right judgment;" and this is now more important in questions of certificate, since an appeal has been given to a higher tribunal. Sir William Grant says, of the position of a banker, "There is a fallacy in likening the dealings of a banker to the case of a deposit, to which in legal effect they have no sort of resemblance. Money paid into a banker's hands becomes immediately part of his general assets, and he is merely a debtor for the amount." The law, as thus laid down by Sir William Grant, in *Devaynes v. Noble*, 1 Mer. Rep. 568, is confirmed by several other cases: *Carr v. Carr*, 1 Mer. 541; *Sims v. Bond*, 5 Bar. & Ad. 392; *Swan v. the Bank of Scotland*, 1 Deac. R. 755; and by a recent case of *Foley v. Hill*, 2 H. L. Cases, p. 28, in which the judgment given by the House of Lords is more strictly correct, and in conformity with a case decided in the Court of Exchequer, of *Pott v. Clegg*, 16 Mees. & W. 321, decided by a majority of the Court: "That money in the hands of a banker is merely money lent, with the superadded obligation that it is to be paid when called for by the draft of the customer;" Lord Chief Baron Pollock stating the hesitation of his own opinion, whether there is not a special contract between the banker and his customer as to the money deposited, which distinguishes it from the ordinary case of the loan of money. His Lordship adds: "It seems to me that it is a question for the jury, who ought to decide what is the liability of the banker, and whether the money deposited with him is money lent or not." The rest of the Court did not partake of this doubt, but laid down the law as subsequently confirmed in *Foley v. Hill*. The case of *Foley v. Hill* was carried to the House of Lords upon an appeal against the judgment of Lord Chancellor Lyndhurst, who reversed the

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judgment of the Vice-Chancellor of England in the same case, and an attempt was then made to impugn the doctrine of Lord Lyndhurst and the other cases ; but the House of Lords affirmed the judgment of Lord Lyndhurst. Lord Cottenham (Lord Chancellor), in giving his judgment, says : “ No case has been cited in which a fiduciary character has been given to the relation of banker and customer ; but it has been attempted to be supported by other cases supposed to be analogous. These are cases where bills have been filed as between principal and agent, or between principal and factor. Now, as between principal and factor, there is no question whatever that that description of case, which alone has been referred to in the argument in support of the jurisdiction, has always been held to be within the jurisdiction of a court of equity, because the party partakes of the character of a trustee. Partaking of the character of a trustee, the factor—as the trustee for the particular matter in which he is employed as factor—sells the principal’s goods, and accounts to him for the money. The goods, however, remain the goods of the owner or principal until the sale takes place, and the moment the money is received, the money remains the property of the principal. So it is with regard to an agent dealing with any property ; he obtains no interest himself in the subject-matter beyond his remuneration ; he is dealing throughout for another ; and though he is not a trustee, according to the strict technical meaning of the word, he is *quasi* a trustee for that particular transaction for which he is engaged ; and therefore in these cases the courts of equity have assumed jurisdiction. But the analogy entirely fails, as it appears to me, when you come to consider the relative situation of a banker and his customer ; and for that purpose it is quite sufficient to refer to the authorities which have been quoted, and to the nature of the connection between the parties. Money, when paid into a bank, ceases altogether to be the money of the principal ; it is then the money of the banker, who is bound to return an equivalent by paying a similar sum

to that deposited with him when he is asked for it. A banker, however, may, in certain cases, be in the position of a trustee, as in the case of *Story*, before Commissioner Goulburn; and in the present case also, as regards one particular transaction, to which I shall have occasion to advert by-and-by." In the same case of *Foley v. Hill*, it is thus put by Lord Brougham. His Lordship says: "Now, as to the banker: is his position with respect to his customers that of a trustee with respect to his *cestui que trust*? Is it that of a principal with respect to an agent, or that of a principal with respect to a factor? I see no ground for contending that there is any identity in those two points. I am now speaking of the common position of a banker, which consists of the common case of receiving money from his customer on condition of paying it back when asked for or when drawn upon, or of receiving money from other parties to the credit of the customer upon like conditions, to be drawn out by the customer, or, in common parlance, the money being repaid when asked for, because the party who receives the money has the use of it as his own, and in the using of which his trade consists, and but for which no banker could exist, especially a banker who pays interest. But even a banker who does not pay interest could not possibly carry on his trade if he were to hold the money and to pay it back as a mere depository of the principal; but he receives it, to the knowledge of his customer, for the express purpose of using it as his own, which, if he were a trustee, he could not do without a breach of trust; it is a totally different thing, if we take into consideration acts that are often performed by a banker, and which put him in a totally different capacity, for he may, in addition to his position of banker, make himself an agent or trustee towards a *cestui que trust*; for example: suppose I deposit exchequer-bills with a banker, and he undertakes to receive the interest upon them, or undertakes to negotiate or make sale of those exchequer-bills, and to credit my account with the proceeds of the sale, I do not stay to ask whether, in that case, he might not be in the

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position of a trustee, and might not partly sustain a fiduciary character; but he does that incidentally to his trade of a banker. His trade of a banker is totally independent of that: his trade of a banker consists in the general trade, to which the other is an accidental addition. That being the trade of a banker, and that being the nature of the relation in which he stands to his customer, I cannot, without breaking down the bounds between equity and law—without removing, as it were, the landmarks of jurisprudence—I cannot at all confound the situation of a banker with that of a trustee, and conclude that the banker is a debtor with a fiduciary character.” Lord Campbell and Lord Lyndhurst concurred. Let it not be inferred, however, from the foregoing observations, that the obligations upon a banker in his general dealings are one jot the less weighty than those upon a trustee in a fiduciary character. As with the trustee, so is it with the banker—his honour is his life, “both grow in one;” and the relation in which the banker stands to his customers creates and enjoins inflexible rules of prudence as well as of duty. Success in banking requires a rigid adherence to the purest good faith and strictest integrity, but, withal, the attention of the banker must be unremitting; for the implied contract which a banker enters into with every one of his customers, that he will pay cheques drawn by the customer, provided he (the banker) has received sufficient funds belonging to the customer, makes him liable to an action for a breach of duty if he fail to do so within a reasonable time after he has received such funds, and that without malice in the banker, and without any actual damage to the customer. We have an instance of an action against a banker for a breach of this duty in the case of *Marzetti v. Williams*, 1 B. & Ad. 415. In that case the amount of the balance due from the banker to the customer on the evening of the 17th December, 1828, was 69*l.* 19*s.* 6*d.* a few minutes before eleven o’clock on the morning of the 19th, a further sum of 40*l.* being a Bank of England note, was paid

in to his account. On the same day, about ten minutes before three o'clock, a cheque drawn by the plaintiff in favour of Messrs. Sampson and Co. for 87*l.* 7*s.* 6*d.* was presented at the banking-house of the defendants for payment. The clerk to whom it was presented, after having referred to a book, said there were not sufficient assets, but that the cheque might probably go through the clearing-house. The cheque was paid on the following day. The jury found a verdict for the plaintiff, upon the ground that, when the cheque was presented for payment, a reasonable time had elapsed to enable the defendants to enter the 40*l.* to the credit of the plaintiff, and, therefore, that they must or ought to have known that they had funds belonging to him; and it was held that that was sufficient to entitle the plaintiff to nominal damages, for he had a right to have his cheque paid at the time when it was presented, and the defendants were guilty of a wrong by refusing to pay it. Such, then, being the position of a banker, the customers necessarily look for cautiousness and circumspection in the use of money lent to him in that character, and they naturally expect that the banker will confine his trade, in the application of the assets of his bank, to its legitimate business of discounting bills, and purchasing, or advancing money upon, proper securities. If a banker advance money upon personal security, such loans are generally made to persons whom he thinks will employ it profitably, and in such cases also it is usual for the bank to require that, within moderate periods of time, the repayments of the customer should, on most occasions, be equal to the advances made to him, so as to insure frequent and regular operations; men being for the most part either regular or irregular in their re-payments, as their circumstances are either thriving or declining. (See 2 Smith's *Wealth of Nations*, p. 35, &c. on the Scotch system of banking in this respect.) But it would obviously be inconsistent with the first principles of banking to permit the several partners of a firm to draw, or to take upon loan and to apply to their own separate

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use, any considerable portion of the assets, without lodging security with the bank, and to spend the money advanced in an unproductive manner, or to lock it up so as to preclude the possibility of such funds being made available by the bank (if necessary), in the event of a contraction of its deposits or issues. Bankruptcy statistics, indeed, furnish too many instances, and I fear bankers will be found in the number, of persons who suffer themselves to be so blinded that "they cannot look beyond a present advantage, nor fear to seize upon it by ways never so indirect; they cannot see so far as to the remote consequences of a steady integrity, and the vast benefit and advantages it will bring a man at last." I may, therefore, remind and urge upon traders, how essential it is for their own interest, and from its conduciveness to the practice of duty, and more especially if involved in straits or difficulties, that they should keep a strict watch over themselves. The sequel of the two bankruptcies of Gibson and of Sturt, now before the Court, strongly exemplifies the necessity of this as a fundamental rule of conduct. We may safely affirm that the best line of policy for the trader, and his surest road to advancement, is to be "obstinately just;" never to think of improving his fortune without regard to the methods towards it; and to despise all ends which come in competition with his duty. It is true that, with the best monitor, he may be unsuccessful; unforeseen accidents may pervert his well-laid schemes—adversity may depress him—the fraud or failure of others, or miscarriages and disappointments, to which all human affairs are subject, may reduce him to ruin; but still he will not be destitute—his commercial friends will not forsake him, his character supports him, the law will give him relief, and those who trusted him before will be ready to trust him again. "A man of clear reputation, though his bark be split, has something left towards setting up again." This brings me to the particular facts of the case now under consideration. It appears that Mr. Sturt, previous to his connection with

Mr. Gibson, had been a clerk in a bank at St. Albans, which was carried on by Mr. Muskett. He continued with Muskett for some years, until the death of that gentleman, in 1842, and was subsequently, for about two years, engaged in settling Mr. Muskett's affairs. Sturt then entered into a negotiation with Gibson, who had been for many years in practice as an attorney at St. Albans, and whom Sturt believed to be a man of property, and who was at that time possessed of landed property of the estimated value of from 8,000*l.* to 10,000*l.* After some preliminary discussion, it was arranged that a partnership should be formed between them, and (Sturt having no money and Gibson no ready money) that 1,500*l.* should be borrowed of the Commercial Bank as a capital to commence with, upon the security of deeds to be deposited by Gibson, and that Sturt should be the managing partner, with a salary of 350*l.* a year and one-third of the profits; Gibson says (and he wrote to Sturt to that effect in March, 1844) that, should the clear profits, after payment of all expenses, not amount to 350*l.* a year, Sturt's salary was to abate in proportion. Sturt says he was to draw his salary without reference to the profits, and he conducted the business on this footing. Under the above arrangement with the Commercial Bank, a sum of 1,200*l.* was advanced by them on the joint and several promissory note of Gibson and Sturt for 1,500*l.* and the deposit of certain title-deeds belonging to Gibson; 300*l.* (the balance) being left with the Commercial Bank to the credit of Gibson and Sturt. I will here at once dispose of an objection made against the bankrupts for establishing this bank. It was said that Sturt, so far from having any capital, was in debt. I think there is nothing in this objection. It is true he owed his brother 600*l.* or 700*l.*; but the debt was barred by the Statute of Limitations, and Sturt says he was not looked to for payment, and although, no doubt, every partnership presupposes that there must be something brought into the common stock, or fund, by each partner, it is not necessary that each should contribute, or

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contract to contribute, money, goods, effects, or other property, towards the common stock ; for one may contribute labour or skill, and another may contribute property, and another may contribute money, as they shall agree. In this case, Sturt was to contribute labour and skill, and Gibson was to contribute property, upon which money was to be raised. In February, 1844, the bank opened at St. Albans, under the name of the “ St. Albans and Herts Bank,” and the firm consisted of the bankrupts, Edward Gibson and George Sturt. The business of these gentlemen as bankers was of small extent and of short duration, for on the 2nd December, 1847, after barely four years’ trading, the bank was obliged to close its doors. During this period, the St. Albans Bank was supported by the Commercial Bank, who advanced, I think, in October, 1846, a further sum of 1,500*l.* upon the like note of Gibson and Sturt, and a deposit of other title-deeds of Gibson, and at the time of the stoppage, on the 2nd of December, 1847, the drawing account of the St. Albans Bank with the Commercial Bank was overdrawn to the amount of about 3,900*l.* for which Gibson’s deeds, and the deeds relating to the bank premises and a house on Holywell-hill, were lodged as security. The Commercial Bank had also a further claim in respect of some overdue bills, and, after realising their securities, they expect to be creditors of Gibson and Sturt for about 2,300*l.* ; and they have made their election to claim this sum against the separate estate of Gibson on the two promissory notes for 1,500*l.* each. At the stoppage of the bank, the joint creditors, as set down by Gibson in his statement of liabilities and assets, amounted to 13,673*l.* ; thus : Commercial Bank, 8,199*l.* ; depositors (or customers of the bank), 3,729*l.* ; notes in circulation, 1,550*l.* ; amount advanced to pay extent, 195*l.* ; total, 13,673*l.* The assets, as set down by him, amounted to 11,463*l.* ; thus : By bills, 5,740*l.* ; by debtors, 4,573*l.* ; by bank premises, 1,100*l.* ; by house on Holywell-hill, 300*l.* ; total, 11,713*l.* ; deduct for bad debts, 250*l.* ; grand total,

11,463*l.*; leaving an apparent deficiency of only 2,210*l.* I should state, however, that this subdivision does not appear in Mr. Gibson's statement: the item there, as an asset, is simply "by bills, 5,740*l.*" Mr. Begbie, the accountant, in whose hands the bank books were placed by Gibson, for the purpose of making out a statement, made the balance of the overdue bill account only 1,612*l.* and bills receivable 924*l.*; and this nearly agrees with the amount given by Sturt to Mr. Walker (Gibson's solicitor). He made the overdue bills to be about 1,500*l.* I shall have occasion to advert presently to the reason for deviating from Begbie's statement as to the overdue bills. The second large item in the account of assets, "debtors, 4,573*l.*" included 4,290*l.* the sum owing by Gibson to the bank for overdrawing, the payment of which, of course, depended upon Mr. Gibson's own private resources. The principal part of Mr. Gibson's property was held as security by the Commercial Bank. The Commercial Bank expected that, with the securities which they held, they would be about covered, or nearly so; but the result has been, that the securities to the Commercial Bank will be insufficient to cover their debt by above 2,000*l.*; and there are no assets whatever under the joint estate. There is a very small sum—about 160*l.*—claimed as joint estate; but if decided to be so, the greater portion, if not the whole, will be required for the expenses. The joint creditors, with the exception of the Commercial Bank, who elect to go against Gibson's separate estate for the deficiency on their securities, will not get a fraction of dividend. The loss upon the sale, by the Commercial Bank, of the property of Gibson in their hands, as compared with Page's valuation, is nearly 2,000*l.*; and some of the bills in their hands also turned out to be bad. Gibson's separate creditors, at the time of the stoppage, amounted, according to his statement, to 7,030*l.* including the sum of 4,290*l.* which he owed to his bank for overdrawing. To meet this, Mr. Gibson sets down that part of his private estate which consisted of freehold, leasehold, and copyhold property, his life interest

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under his marriage settlement, and debts due to him, as being of the value of 7,793*l.*; from which he deducts, for two incumbrances of 1,000*l.* due to his mother, and 300*l.* to his brother (W. Gibson), and costs of realising, 250*l.*, 1,550*l.*; leaving 6,443*l.* To this he adds, for different mortgages, 3,437*l.*; making his total private estate 9,880*l.* Then, deducting the amount due by him as above, 7,030*l.* he shows an available balance of 2,849*l.* Now, it must be observed, that in this statement no mention is made of any incumbrance on any part of the property in favour of the Commercial Bank; and the fact is, that if the property upon which the Commercial Bank had a lien, as well as that upon which there were the prior incumbrances of Mrs. Gibson and William Gibson (the mother and brother of the bankrupt), had been taken out of the list of property, the private estate of Gibson over which he had control to set apart would be as follows:—Property in land—one share of freehold and copyhold land at Soham, value 125*l.*; an acre of land at Bushey, 70*l.*; T. Woodward's mortgage, 650*l.*; T. Webb's ditto, 215*l.*—total, 1,060*l.*; his life interest under marriage settlement, 2,258*l.* This last item was to be appropriated to raise a sum to pay off the notes of the bank in circulation, of which I shall presently speak more fully. The only other asset of private estate was—debts due to Gibson, 960*l.* These debts were three in number, of which two, amounting to 700*l.* proved bad. The actual result with respect to Gibson's separate estate, irrespective of the amount which he owed to the St. Albans Bank for overdrawings, is as follows:—The debts proved against it are 3,300*l.* and the debts claimed, that is, 2,300*l.* to the Commercial Bank, and 1,200*l.* to Mr. Gibson, after giving credit for amount realised on their securities, 3,500*l.*; making together 6,800*l.* A dividend of 1*s.* 2*d.* in the pound has been declared, which amounts to 39*l.* 14*s.* About 300*l.* more has been received since by the official assignee (159*l.* of which is claimed by the joint estate), and there are some outstanding debts; but I fear there is no chance

of the dividend reaching 2s. 6d. in the pound. Shortly after the stoppage of the bank, namely, on the 4th January, 1848, Gibson called a meeting of his creditors, when he laid before them the statement of the liabilities and assets of the bank, of which I have just given the particulars, and there showed an apparent deficiency of only 2,210*l*. He also laid before the creditors the statement of his private estate, which he proposed to set apart, purporting to show also the claims against that, and leaving, as I have before said, an apparent available balance of 2,849*l*. to meet the supposed deficiency in the bank assets of 2,210*l*. Mr. Walker addressed the creditors, as detailed by him in his evidence. He represented that Mr. Gibson's private estate was considered adequate to the discharge of all his liabilities, and that he (Walker) had the assurance of Mr. Cutbill, the manager of the Commercial Bank, that all the bills in their hands as securities were good—that though it might be necessary to give time, they would all be paid; and he further stated that he had Sturt's assurance that, with the exception of Crew's bill, they might be taken as good. The valuations made by Mr. Page of Gibson's property, and by Mr. Collier of such portion as was deposited with the Commercial Bank, were also stated to the meeting. Upon the faith of the written statements of the liabilities and assets, &c. of Gibson's private estate, and the representations made to the meeting by Mr. Walker on behalf of Mr. Gibson, all the creditors who were present assented to Mr. Gibson's proposals—that he (Gibson) should be at liberty to wind up the affairs of the bank under the superintendence of three inspectors; that Gibson should be at liberty to pay the notes then in circulation, and small debts of the firm, not exceeding 30*l*. in full; and for that purpose to raise money by a mortgage of his life interest under his marriage settlement and his life policy in the Norwich Union; that Gibson should be at liberty to realise the bank assets and the properties and securities comprised in the schedule, being the private estate of Gibson (subject to

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the charges already existing thereon), to discharge, first his private debts, and then the liabilities of the firm. There were other provisions in the resolutions, which seemed to contemplate the payment of the creditors of the firm by four dividends. Inspectors were appointed, and the creditors agreed not to take any proceedings at law or in equity against Gibson or the late firm for enforcing payment of their debts. The resolution was signed by all the creditors present at the meeting. Here a most material question presents itself—whether Gibson was acting *bonâ fide* with his creditors on that occasion, or whether, as has been charged against him, he was guilty of deliberate fraud and misrepresentation. First, then, with respect to the statement of Gibson's private estate set apart, and to the valuations put upon it. Coupling this statement with the representations made by Mr. Walker at the meeting of creditors, in which he alluded to part of the property having been pledged with the Commercial Bank, and stated that a valuation of such part was made by Mr. Collier,—I acquit Gibson of wilful fraud in omitting to set forth in the list or schedule of his private estate the particulars of the charge or lien which the Commercial Bank most undoubtedly had upon the greater portion of that property; but at the same time I think Gibson was most rash and indiscreet in thus emblazoning his property, as it were, and holding out fallacious hopes to his creditors. A little examination at once detects the fault. Gibson makes the value of his private estate unencumbered to be 9,880*l.* and says that, out of this sum, he has first to provide for 7,030*l.* 10*s.* 6*d.*—that is, 4,290*l.* 10*s.* 6*d.* the amount of his overdrawings; and 2,740*l.* the amount of his separate debts; and that he would then have a surplus of 2,849*l.* 9*s.* 6*d.* applicable to any deficiency there might be in the joint assets of the bank. But before Gibson calculated upon any surplus on his private estate, he should, I think, have shown the deductions to which his private estate was liable. In the first place, the Commercial Bank had a charge on property

of the estimated value of 4,455*l.* part of the 9,880*l.*; then the life interest under Gibson's marriage settlement, valued at 2,258*l.*; other part of the 9,880*l.* was to be applied to raise a sum to pay off the note-holders and the small debts under 30*l.*; then, again, 700*l.* other part of the 9,880*l.* was the amount of two bad debts; and Mrs. Gibson had a charge of about 100*l.* on 355*l.* part of Smith's mortgage, which was also included in the 9,880*l.* Now, the greater part, if not the whole, of these four sums—that is, 4,455*l.* with the Commercial Bank; 2,258*l.* to pay off note-holders; 700*l.* two bad debts; about 100*l.* Mrs. Gibson's, on Smith's mortgage; 7,513*l.* in all—should have been deducted from the 9,880*l.* before Gibson could safely reckon on any sum to meet the amount which he had to provide for. The account would then have stood thus—9,880*l.* estimated value of Gibson's private estate; 7,513*l.* probable deductions to be made; 2,366*l.* balance. But Gibson has to provide for 7,030*l.* 10*s.* 6*d.*; and has 2,367*l.* balance shown above applicable to that purpose; leaving 4,663*l.* 10*s.* 6*d.* deficiency. Between the private estate, therefore, which Gibson professes to set apart, and the probable result of the disposition to which his property was liable, there is a difference of 7,513*l.* against Gibson; in other words, instead of having a surplus of 2,849*l.* 9*s.* 6*d.* there appears a deficiency of 4,663*l.* 10*s.* 6*d.* Besides this, no allowance is made for the expenses of realising the property, and a debt of about 2,000*l.* which Gibson owed to his brother (William Gibson) is not included in his private debts. It seems that William Gibson had, as security for this, a mortgage on a contingent interest of the bankrupt under his mother's marriage settlement, subject to her power of appointment; this contingent interest was not reckoned as part of Gibson's private estate, and he says that it was understood and arranged that his brother should take it in discharge of his debt; there was nothing, however, to bind the brother to that arrangement, and it was not carried out; and the brother has, in fact, proved against Gibson's separate

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estate for the balance of his debt, giving credit for the value of the contingent interest. I should state that Gibson's furniture, which he valued at somewhat above 1,000*l*. and two or three other small items which have produced about 350*l*. were not included in the list of the private estate, and I think Walker alluded to this at the meeting, and said that Gibson would have something left after what he had appropriated to satisfy other debts. The view which I have taken of Gibson's private estate is upon the supposition that the Commercial Bank would be obliged to have recourse to their security upon it, and I think Mr. Walker must have expected that they would, for he says in his evidence, that he understood from Mr. Cutbill that the Commercial Bank would have a surplus of 1,000*l*. to hand over to Gibson ; so that, in this view of the case, as the security of the Commercial Bank amounted to 4,455*l*. 3*l*. 455*s*. of Gibson's private estate would be absorbed by the Commercial Bank. Moreover, Mr. Cutbill, in his evidence, says that he had several interviews with Walker and Gibson before the meeting of creditors took place. They (Gibson and Walker) communicated to Cutbill the proposal intended to be made to the creditors, and applied to him, as manager of the Commercial Bank, to be allowed to pay the note-holders of the St. Albans Bank in full ; and after communication with the committee of the directors, the result was, that Collier was to be sent down to value the property on the part of the bank, which he did with Page, the surveyor of Gibson. By Collier's valuation, it was found that the bank was not secure to the extent of about 500*l*. Page's valuation exceeded Collier's by about 500*l*. or 600*l*. Cutbill, in his evidence, says that Walker (Gibson's solicitor) said there might be a possible deficiency of 1,000*l*. to the bank, but it was not very probable ; and if there was, he was authorised to say that the members of Gibson's family would make it up. Cutbill also says that Gibson said the same ; and seeing that there was a probability of the deficiency not exceeding 500*l*. and believing Gibson to

be solvent, he (Cutbill) assented, on the part of the Commercial Bank, to the course proposed by Gibson. The actual deficiency to the Commercial Bank, I have before stated, is 2,300*l.* and is claimed against the separate estate of Gibson. Thus it will be seen that, independent of any extraneous aid through Gibson's family or connections, the customers or depositors of the bank had mainly to depend upon that very questionable item in the joint assets, "By bills, 5,740*l.*" Before, however, I go to that, I will dispose of the question arising on the valuations of Gibson's property. Now, when I consider the steps which were taken to obtain these valuations—that Mr. Collier, from London, was employed on behalf of the Commercial Bank; that Mr. Page, of St. Albans, was employed on the part of Mr. Gibson, with instructions to put such a value upon the property as it would fetch by auction; that the valuations of both Collier and Page were stated to the meeting of creditors; that, although they differed in amount, Collier's being about 600*l.* less than Page's, that Mr. Page, with a knowledge of that circumstance, supported his own valuation before the creditors—under all these circumstances, I think Mr. Gibson is entitled to the full credit that he was impressed with the belief (and I think that belief was well warranted at the time) that his property was worth the amount at which Mr. Page appraised it. Allusion was made by the learned counsel (Mr. Bagley) to some remarks of Mr. Collier as to the uncertain nature of the property, and difficulty of realisation, and that these were not read to the meeting. It would undoubtedly have been more satisfactory if the attention of the creditors had been drawn to those remarks; but still I think it was not too much for Gibson and Walker (his solicitor) to assume that Collier, in making his valuation, had taken into account the circumstances alluded to by him in his report, and the concluding paragraph of Mr. Collier's report shows, I think, that he must have done so. Collier says, "The bank fittings and house fixtures, and also the fixtures in the several houses and cottages occupied by

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yearly tenants and weekly tenants, are included in my valuation, which amounts in the aggregate to the sum of 5,440*l.* which sum I am of opinion is the fair market value of the entire property, and as much as it will realise upon a sale by auction." I now come to the statement as to the supposed joint assets. Upon this point I have to consider whether the examination of the bankrupt (Gibson), and the evidence given by Mr. Walker (Gibson's solicitor) and Jerwood (his clerk), disclose satisfactory reasons for deviating from the statement made out by Mr. Begbis (the accountant in whose hands the books were placed on the recommendation of Mr. Walker). With regard to the overdue bill account and the bills found in Sturt's bill-case, from which the large item, "By bills, 5,740*l.* 1*s.* 4*d.*" was put down at the head of the available bank assets, and which bills were gone through by Gibson and Jerwood, I think they were too hasty in their conclusions. I think they suffered their assent to go faster than their evidence. A little more examination would have satisfied them that some of the bills comprised in that item ought not to have been treated as assets at all, and that others were of a doubtful character. Some had been paid before; one had been proved by Gibson himself under a bankruptcy some years previously; many were long overdue, and some had been sued upon. In this item, then, "By bills, 5,740*l.*" without any qualification or remark (although differing from the accountant and Sturt's view of the matter), lies the grand error of Gibson's statement of the bank assets. At the same time, I must confess that I am indeed surprised that no creditor should have made any inquiry about this important item. We all know how sanguine people are in relation to their own affairs. Debts and obligations which other parties would hardly reckon worth anything are often estimated by them "as if they were so much bullion;" but the creditors, in taking such an item as an asset to the full amount, were in reality believing and assenting to a thing neither evident nor certain, nor yet

so much as probable. I do not say this in justification of Gibson's following the false appearance which his own want of care and attention had put upon the assets of the bank. My intention is merely to show that the statements of a fallen house are not generally looked upon as certain and infallible ; assets are seldom realised to the extent exhibited on paper ; creditors, therefore, are not apt to rely upon such statements without caution and inquiry. But in the present instance the creditors seem implicitly to follow in the track in which Mr. Walker leads them ; embracing absolutely and unreservedly the pleasing assurance made on the part of Gibson, that there was enough to pay everybody, they care not to go further into particulars, and forbear to analyse for themselves the means which Gibson says he has for the accomplishment of such ends. A question, indeed, was put by Mr. Gomme, one of the creditors, to know what was to be done if perchance the property should not produce sufficient, and the creditors seem to have understood from Mr. Walker that Mr. Gibson's family would make good any deficiency. This, however, was not, I think, a source from which the creditors had any right to look for payment, and from the evidence I should say that there was no positive assurance from Gibson or Walker that Gibson had authority to pledge his friends to any such undertaking ; but from what did pass, the creditors were led to suppose that the family of Gibson would render assistance in case of need. I think the proposal made by Gibson, that he should at once raise a sum to pay off the noteholders and small debts under 30% was in itself desirable, and I cannot impute it to Gibson as an intentional fraud upon the other creditors. An observation arises upon this both ways : it may be said to be in some measure confirmatory of Gibson's belief that there would be sufficient to satisfy all claims against him ; but, on the other hand, it cannot be denied that he thus silenced a body of creditors who would have placed insuperable difficulties in the way of his desired arrangement, and whom, therefore, he

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might think it necessary to satisfy at all hazards. The creditors, however, who were present at the meeting exercised their judgment upon the proposal, and they, as well as the Commercial Bank, having assented to it, cannot make their own acquiescence, or the proposal itself, a ground of charge against Gibson. On this part of the case I will only add, that I think Sturt ought to have attended the meeting of creditors and have accounted for the cash balance (about 1,084*l.*) then in the bank, which was reduced to about 800*l.* after giving Sturt credit for the sum paid by him towards the "extent;" but my judgment against Sturt will not be affected by this circumstance, and I am willing to take, as an excuse for his non-attendance, the terms on which he then stood with Gibson, his fear as to the safety of his own person from arrest, and his expectation that Mr. Day (his solicitor) would have attended for him. I now come to a part of the case of more serious aspect. I refer to the large amount of overdrawing, and the alienation of the assets of the bank from their legitimate purposes for the convenience of the bankrupts themselves. The charge is a grave one, but, unhappily, the facts fully bear it out. From the first establishment of the bank, Gibson seems to have adopted a system of overdrawing his account, apparently without any rule to go by but his own affections and wishes; and the amount of his overdrawn account annually increases. Thus a stream was continually running out of the bank, much larger than that which was continually running in. At the end of the first year, December 31, 1844, Gibson had overdrawn 2,542*l.*; at the end of the second year, December 31, 1845, he had overdrawn 3,685*l.*; at the end of the third year, December 31, 1846, he had overdrawn 4,302*l.*; at the end of the next half-year, June 30, 1847, he had overdrawn 5,202*l.* Shortly after this, his account was reduced by 1,000*l.* which he borrowed of his mother, on the security of the Oster-hill property, which the Commercial Bank had held, but for which the bank premises and the houses on Holywell-hill were substituted. At the

close of the bank, on the 2nd of December, 1847, Gibson had overdrawn 4,272*l*. Besides this, there were some small sums advanced to Smith and Webb on Gibson's account, and with which Gibson ought to have been debited. It appears that in March, 1846, Sturt wrote to Gibson, remonstrating with him upon the subject, and urging the necessity of his reducing the amount of his overdrawn account, and of his getting in some other claims, over which he considered Gibson to have control. Sturt was well aware, as indeed he states in his letter, that the bank could not possibly be carried on with so large an amount of its customers' balances diverted from their legitimate uses. Sturt thus writes to Gibson under date the 16th of March, 1846 :—

“ Dear Sir—Herewith you have your passbook made up, showing the balance against you to be 4,161*l*. 5*s*. 4*d*.; in addition to which I send a list of debts over which I have no control, making a total of 5,534*l*. 16*s*. 4*d*. as it were locked up on your account. Now, the effect of this state of things is palpable, and is as clearly seen through by Mr. Cutbill, as if he had the figures before him. In the first place, it compels us to re-discount all our bills, even those payable locally, which is highly detrimental to our credit; secondly, it keeps us continually subject to having our account with the Commercial Bank overdrawn; and, thirdly, it puts us so completely in the power of the Commercial Bank, that our very existence depends upon their will and pleasure. From the foregoing, I trust you will see the necessity of reducing the amount of your overdrawn account, and also for getting the claims in the accompanying list brought to a speedy settlement. Two things are quite certain: first, that I cannot be answerable for transactions over which I have no control; secondly, the bank cannot possibly be carried on with so large an amount of its customers' balances diverted from their legitimate uses.

“ Yours faithfully,

“ G. STURT.”

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In answer to this, Gibson says, he does not complain of Sturt's calling his attention to his own account, which, he admits, "is certainly very unsatisfactory;" but he complains of having thrown upon him the responsibility respecting the debts referred to; Sturt having the entire management of the bank, with but very few exceptions. On the following day Gibson writes again to Sturt, and, on the subject of his overdrawn account, he says:—"I am well aware, and freely admit, that the state of my account is quite indefensible. Had I been the least aware of it (for my ignorance there is no excuse), it would not have occurred." He then says he has not exceeded his income, and that the deficiency has arisen partly by an increased outlay in his business, but principally from a laxity to others, in some measure from an impression (however mistaken) that his pressing others might injure their credit. He then alludes to a 1,000*l.* cheque of Peppercorn's, which he must provide for in some way. I regret that Gibson should have ventured to say, in his letter, that, had he been the least aware of the state of his account, the charge made against him would not have occurred; for, though he follows it up by saying his ignorance is no excuse, it is impossible, without running counter to the ordinary rules of reasoning, to credit that a gentleman in Gibson's situation should overdraw his account to the extent of 4,000*l.* and not be aware of it; and his plea of ignorance is quite irreconcilable with his subsequent continuance in the same course of draining the coffers of the bank. By a following letter, of the 19th of March, 1846, Gibson proposes "to borrow 2,000*l.* or 3,000*l.* to meet their present necessities, and until he could make out his accounts, and get in what moneys were outstanding, and which ought to be paid." I do not find, however, that any effectual step is taken by Gibson to relieve his overdrawn account. In October, indeed, of that year, the Commercial Bank advance a second 1,500*l.*; but that sum is advanced for the general purposes of the bank. This temporary relief appears to have kept Sturt quiet till the following year.

Gibson's overdrawn account had then further increased. On the 30th of June, 1847, it was nearly 2,000*l.* more than when Sturt made his first complaint in March, 1846. In the month of August, 1847, much correspondence takes place between Gibson and Sturt on the subject of the bank; they are then upon such terms that Gibson thinks it best to communicate with his partner only by letter. It appears to me, from the correspondence, that the affairs of the bank ought to have been brought to a close at that time. On the 10th of August, 1847, Gibson writes to Sturt:—"As you may naturally suppose, the bank has of late caused me much anxiety, and I see no prospect of our being able to carry it on satisfactorily, unless a large amount of capital is placed in it. This I am unable to do; I have, therefore, after the most mature deliberation, made up my mind to relinquish my interest in it; at the same time I wish to do so without, if possible, in any way interfering in your arrangements, and I will use every exertion to promote your interest. I shall feel obliged by your furnishing me with a balance-sheet, in order that I may know my exact position, and proceed at once to provide necessary funds. Please, also, not to discount any further. I need scarcely add, that the subject of this letter should, for obvious reasons, be kept strictly private for the present." Gibson, at the same time, communicated his intentions to Cutbill, as the manager of the Commercial Bank. I presume Sturt felt that it was impossible for Gibson to withdraw from the bank, and he presses him further as to his intentions, and throws the *onus* of their difficulties upon him. Gibson declines to state more until he is furnished with a balance-sheet. On the 17th of August Gibson writes:—"I will sign any bills or documents to which you may require my signature in consequence of the notice from the Commercial Bank." When Mr. Cutbill, the manager of the Commercial Bank, saw that the partners, Gibson and Sturt, were differing, he gave them notice, requiring the signature of both partners to bills, &c. (to which Gibson here alludes). Gibson con-

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tinues:—"I do not think that we have anything to fear from the Commercial Bank; at the same time I trust you will not alarm the directors. Whatever course we eventually take, it must of course be a work of time. Mr. Cutbill told me, when I last saw him, about a month since, that he understood from you that our circulation did not exceed 1,500*l*. My first object is, of course, to set my own account straight, and then to arrange with you, by procuring, if possible, some one to take my place, or to dispose of the bank. My anxiety for you and yours is great, and I much regret that, judging from your letters, you seem to think differently." Then, on the 21st of August, in consequence of another angry letter from Sturt, Gibson writes:—"It was my intention to have come to the bank this afternoon, as usual, but your letter just received of course prevents my doing so. I am really surprised that you write as you do. I see no objection to the arrangement proposed by the Commercial Bank, and am quite ready, as I have before said, to acquiesce in it. When necessary, I hope to be prepared to meet my liabilities. It is no difficult task to lay the whole of the blame upon me; but if I am not mistaken in my calculations, your account must be much overdrawn. I do not say this by way of recrimination, but I do think that you are not in a position to write to me in the style in which you do. I return Mr. Cutbill's letter." Matters still go on, and in October Gibson is pressed by Cutbill, who is desirous of knowing what Gibson's views and intentions are respecting the bank. On the 2nd of November Gibson writes to Cutbill: "I intend to turn my property into money as soon as possible, and with that view I am about immediately to sell a property which is in mortgage to the trustees of my marriage settlement for 2,000*l*. 75*l*. of which, with a large arrear of interest on the 2,000*l*. amounting to about 1,000*l*. is due to me, and I shall as soon as possible sell or mortgage more of my property; in fact, I have been endeavouring to raise money among my relations for some weeks past, but in the present state of the money-market I find such a step impracticable."

On the 29th of November Gibson gives notice to Sturt of a dissolution of the partnership, and proposes "to carry on the bank on his own account for the present." However, about a week afterwards, the business stops altogether. I must now review the proceedings of Mr. Sturt himself, as to encroaching upon the assets of the bank ; and consider how far he, as the managing partner, watchfully looked to his own steps in that wherein he justly regarded Gibson to be so faulty. Sturt drew his salary of 350*l.* a year, and he admits that at the close of the bank there was a balance in account with the bank against him of 756*l.* ; but, in addition to this, he paid out of the bank assets 1,275*l.* for law expenses, of which sum, 265*l.* were for damages and costs in an action of trespass against himself, in respect of his occupation of the bank premises, and the residue, namely 1,010*l.* were the costs of litigation on his own individual account. Upon the merits or demerits of that litigation, it is not my province to express an opinion ; but, situated as Sturt was, with a very limited income as the manager of a bank yet in its infancy, surely he should have kept aloof from any controversy which might possibly involve him in an expensive litigation. Gibson, also, would have acted more judiciously if he had used his best endeavours to restrain his partner's zeal, and had expressed his disapproval of Sturt's conduct in an early stage of the proceedings. It is quite clear, however, that Sturt was most culpable in resorting to the assets of the bank to relieve himself from a personal liability for the costs of his litigation. But now, with regard to another point of expenditure :—It appears by the books—that is, by the ledger and cash-book—that Sturt debits himself with sums paid between September, 1845, and February, 1846, out of the bank assets, amounting to above 1,039*l.* in respect of the bank premises, which were purchased in September, 1845. It would seem by these entries, as if Sturt were purchasing the bank premises for himself, and he is loth to give up the notion of such property being his freehold, even after the stoppage of the bank ; for,

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in his letter to Walker, of the 4th of January, 1848, in speaking of the liabilities and assets, he says—"Balance of account due to Commercial Bank, 6,000*l.*; covered by lien on G. Sturt's freehold property, 1,800*l.*; ditto, E. Gibson's due, 4,200*l.*; total, 6,000*l.*" I presume these words, "G. Sturt's freehold property," refer to the bank premises and the house on Holywell-hill. The purchase, however, of the bank premises was made with Gibson's assent, for he prepared the conveyance; and I find, upon further reference to the books, another account, which is headed "Dr. Bank premises, George-street," and the 1,030*l.* is transferred from G. Sturt's private account to this; other payments are made on account of the bank premises, which are here entered, and the bank premises are also debited with the payments made for the damages and costs in the action of trespass which I have before mentioned, amounting to 265*l.* Then, on the credit side of the account, the three sums making the 265*l.* are transferred to "law expenses account;" but there are no dates to these last entries. This leaves the balance paid in respect of the bank premises to be 1,302*l.*; of this sum, 775*l.* appears to have been drawn from the Commercial Bank, and the rest out of the general assets of the St. Albans Bank. I now come to the "law expenditure account" in the partnership ledger. The total sum standing to the debit of that account is 1,275*l.* including Sturt's law costs, the particulars of which I have before mentioned. As to this account, the official assignee (Mr. Groom) says, "The entries connected with it were made, as appears to me, after Sturt's bankruptcy in August, 1849." Now, this sum of 1,275*l.* was a dead loss to the bank, and if the bank were properly charged with it, it should have been carried to losses; but there is no pretence for saddling the bank with the costs of Sturt's litigation. Furthermore, at the close of the bank, Sturt had to account for a sum of 1,084*l.* which was the apparent cash balance in his hands after giving credit for the notes of the bank given up to Walker, and to the official assignee.

Sturt now accounts for that by saying that he has appropriated to himself 782*l.* ; and against this he charges his own salary for above two years subsequent to the stoppage, and about 234*l.* was paid by him towards satisfying the extent, which was put in just before the stoppage ; the remainder (68*l.*) went in petty expenses, dinners to customers, and sundry disbursements. The accounts then against Sturt on the 2nd December, 1847, would stand thus :—Overdrawn by Sturt, 776*l.* ; appropriated by Sturt to himself after the stoppage, and after the notice of the dissolution of the partnership, 782*l.* ; appropriated by Sturt to discharge his own law expenses, exclusive of 265*l.* for damages and costs in the action relating to the bank premises, 1,010*l.* : total, 2,568*l.* What, then, do Gibson and Sturt say in answer to these charges ? Mr. Lawrance, on the part of Gibson, says that his overdrawings were continuous, and against Gibson's own property ; but this is really no excuse. Gibson gave no security to the St. Albans Bank for his overdrawings, and drawing against the property lodged with the Commercial Bank would, in fact, be consuming the capital which that property was pledged to secure. Then it is said that, in taking the account between Gibson and his bank, he now stands a debtor to the bank in little above 1,000*l.* ; but it must be remembered that Gibson is now seeking to be discharged from the debts owing to the joint creditors of himself and Sturt, and that, as against them (Sturt having nothing), he cannot take credit for the proceeds of sale of any of his property in the hands of the Commercial Bank, or for the notes withdrawn by him from circulation, or for any other payments, until the joint creditors—that is, the customers or depositors of the bank—are paid. Gibson further says, that he reduced his establishment, he changed his house, and laid down his equipage ; but unfortunately, like many others who have exceeded their fortunes, he showed no inclination to reform until it was too late to be of any essential service. Then Sturt says that no creditors looked to him—

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Gibson was the moneyed man ; and that he (Sturt) laboured under a misconception as to Gibson's property. Relying upon this, and on the privity of Gibson to what was going on, Sturt justified the law expenditure, and he would desire to be treated merely as the clerk or agent of Gibson ; but Mr. Sturt must, I think, be sensible that, having been a partner with Gibson, and held out to the world as such, he must share all the responsibilities of a partner ; he had a community of interest with Gibson in the property, business, and responsibilities of the partnership ; besides, Sturt's litigation was not on account of Gibson, or of the partnership ; Gibson, indeed, was acting in the matter for Sturt, but as agent for Mr. Cooper, who was Sturt's London solicitor in the business ; and, whatever might be Gibson's knowledge as to Sturt's inability to meet any extraordinary law expenses, that would not be a justification for Sturt's application of the assets of the bank to such a purpose. Gibson says in his examination, that Cooper once sent him his bill of costs, and he (Gibson) sent it back, saying it belonged to Mr. Sturt, and that he had better send it to him. He (Gibson) acted throughout as Cooper's agent. When Gibson heard from Cutbill, that Sturt had drawn in the name of the firm for 300*l.* the costs awarded in respect of the indictment against Sturt, he (Gibson) wrote to Cutbill, stating that he should not consent to have the bank account debited with that 300*l.* Next, with respect to the charge relating to the short bill of Messrs. Debenham and Kinder. As regards Sturt, it is clear that there was a misapplication and an abuse of the confidence of Messrs. Debenham and Kinder ; the only doubt is, whether Gibson was a party in the transaction. This bill, which was entered short, was sent up to the Commercial Bank, with others, in October, 1847. Upon this subject, Sturt, in his examination, says, " Gibson urged me to send up all the bills we could muster. This bill was produced. I said we had no right to part with it. He (Gibson) said, ' Send it up.' I thought Gibson was solvent, and that no harm could happen.

I now confess my weakness and irregularity in the transaction." Gibson solemnly declares that Sturt never consulted him about sending bills to the Commercial Bank, and that Sturt's statement on that subject is false. With this direct contradiction between the two bankrupts, I cannot consider the charge as proved against Gibson. It is impossible, however, for the Court to exculpate Sturt, the managing partner of the bank; an offence committed by him in that capacity cannot be purged or mitigated by a plea that he was acting under the direction of his partner; and this is no trivial matter; indeed, a banker who has intrusted to him any valuable security for safe custody, or for a special purpose, without authority to negotiate, transfer, or pledge, places himself in great jeopardy of incurring the penalties of the statute (7 & 8 Geo. 4, c. 29, sec. 49) against embezzlement, if, in violation of good faith, and contrary to the object of the trust, he choose to transfer, pledge, or in any manner convert such security to his own use. Having now disposed of the principal charges against the bankrupts, it is sufficient to say, as regards the course taken by Gibson in the action brought against him by Beaumont in December, 1848, that the defence appears to me to have been vexatious; and with respect to Miss Marcon's case, I think Gibson was blameable in communicating to that lady, either in joke or otherwise, that if anything went wrong with the bank he would give her a hint, so that she might withdraw her money in time. It would have been very unjust towards the other creditors if Gibson had given any such hint; and therefore it was improper to retain Miss Marcon's confidence in the bank by inducing her to suppose that it was in his power to protect her interest in preference to any other customer. I must now add a word as to the accounts and the books. Sturt was to keep the accounts, and deliver a balance-sheet every three months; for some little time this was done; but after the first quarter in the second year's trading, no further balance-sheets were made; and although Gibson says he often asked for a balance-sheet, it is not until

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August, 1847,—a few months before the stoppage,—that he makes any formal application for a balance-sheet. Then there was no profit and loss account kept, and the latter entries in the cash-book, and some in the ledger, as to items transferred from the “bank premises account” to the “law expenditure account,” are without dates. As to the profits, without scrutinizing the receipts year by year separately, it is enough to observe that George Sturt’s salary of 350*l.* a year absorbed more than the average net profits. Such a business, carried on at a loss, would be ill able to sustain, in addition to its ordinary losses, a large amount of law costs. Sturt was sensible that the great object for some time must be the increasing of their connexion and getting together a good business, and Cutbill, as manager of the Commercial Bank, was ready to aid the bankrupts in this object. Sturt’s imprudence of laying himself open to litigation was not likely to extend the interests of the bank. Gibson says he told Sturt that if he did not “give up this litigation, it would give them up.” It appears, however, that he told Cutbill that his (Gibson’s) reputation would prevent its having any injurious effect upon the bank. Cutbill says he knew to the contrary; and there could be little doubt but that Cutbill was right in his views. Before I conclude, I must not omit from consideration one great aggravation in this case. Mr. Gibson was a member of a branch of the legal profession—a body as independent, as honourable, as any which exists in this country; as a solicitor of long standing, occupying a confidential position in society, and as a man of character, of good family connexions, and of some fortune, he demanded, and readily secured to himself as a banker, the confidence of the public in St. Albans and the neighbourhood. Mr. Sturt had before been engaged in mercantile pursuits, and had filled places of trust; he had gained great experience in banking in the service of the London and County Bank, in the capacity of manager of a branch at Gravesend, and after that, as manager of Mr. Muskett’s bank at St. Albans. These circumstances bespoke

a like confidence in Sturt ; and if he had acted in the manner reasonably to be expected of him—if he had joined prudence to business-like habits, had steadily regarded the duty which he owed to the customers of the bank, and, as the manager of the establishment, had shown a rooted determination to protect its true interests, he would not only have saved both Gibson and himself from ruin and disgrace, but, in all probability, with the assistance which the Commercial Bank was willing to afford, he would have opened a way to a competency of fortune. I have thus stated and examined all the circumstances of this distressing case ; I say distressing, because it is at all times painful to be obliged to censure the conduct of gentlemen who have heretofore maintained a high reputation for honour and integrity, more especially when, as in the present case, the parties have large families dependent upon their exertions. But the Court must not give way to a false commiseration. I believe, to do justice to the public, while it gives the subject an assurance of his rights and knowledge of his duty, is in truth the surest way of administering mercy to the individual. An opinion has been expressed, on behalf of a large body of creditors, in favour of Sturt, in consequence (as stated by Mr. Linklater) of its being well known that Sturt had no capital, and that the depositors only looked to Gibson as security, and of Sturt's having exercised himself for the benefit of the creditors since the issuing of the fiat. Sturt, in his defence, alluded to this, and to the absence of opposition against him by the principal creditors, and called upon the Court to confirm their good opinion. I have given due consideration to the feelings of the creditors ; but I am bound to declare that I see no legitimate grounds of distinction between the case of Sturt and that of Gibson. Both these gentlemen have shown themselves wholly unfit to manage, or to have any control or influence over, an establishment which is based upon trust. At their own wills and pleasures, they consumed the substance obtained by credit of other men, each for his own separate advantage, against all reason, equity, and

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good conscience. As commercial delinquents, both are alike guilty ; and although, upon the hearing of their case, the two bankrupts severally were desirous of representing their own conduct as excusable, whilst at the same time each of them was fully alive to the faults of his partner, inasmuch as I cannot impute to either of them any lack of knowledge of his duty, I feel satisfied that in their calmer moments, and when they cease to participate in the feelings of the advocate, both the bankrupts will stand also as offenders against their own conviction and their own better judgment. Under all the circumstances of the case, and deeming it to be absolutely essential, not only to the utility but to the very existence of a bank, to preserve (as far as possible) inviolate a reliance on the integrity of the banker, as a sure foundation for that trust which must of necessity be reposed in him, I am compelled, in discharge of my duty, to award the severest sentence of the law of bankruptcy, and to adjudge the bankrupts disentitled to the release of the Court, in respect of debts which they have contracted as bankers, and which they are unable to discharge, not by reason of unavoidable misfortunes or venial indiscretion, but in consequence of an unprincipled management of their bank, and of a shameless misapplication of a large amount of its assets. The judgment of the Court is, that the allowance of the certificates of both the bankrupts (Edward Gibson and George Sturt) be refused.

(Before Mr. Commissioner FONBLANQUE.)

Ex parte BURGHEs, *re* BURGHEs.

Wednesday,
May 29th.

Breach of
trust ; Condi-
tional certi-
ficate.

Where the
bankrupt has

committed breaches of trust, the Court, in allowing the certificate, will annex the condition that it shall not operate against the *cestui que trusts*.

THE bankrupt applied for his certificate. There was no opposition.

From certain proofs on the proceedings, it appeared that

the bankrupt had used and dissipated in his trade certain funds which had come to his hands as executor and trustee, to be applied by him for the benefit of the persons interested under the will.

He had also misapplied moneys which he had received on behalf of parish officers.

The last examination was passed three years ago.

Mr. Commissioner FONBLANQUE.—The lapse of time since the last examination is equivalent to the longest usual suspension of the certificate, though in extreme cases of breach of trust I might suspend the certificate even for a longer period. In this case, I am of opinion that there has, in fact, been a sufficient suspension; I shall therefore allow the certificate; but I shall annex this condition, namely, that it shall not be available against the *cestui que trusts* or the parish officers.

(Before Mr. Commissioner GOULBURN.)

THIS was a sitting for the purpose of auditing the official assignees' accounts.

All parties were present.

Mr. Commissioner GOULBURN.—I take this opportunity of observing, that it is the habit for solicitors for trade assignees to neglect attending the audit sitting, although they claim the costs of such sitting. It is of the greatest importance to creditors that the accounts should undergo the strictest examination; but that, I regret to say, is very rarely done. I have therefore made it a rule, that the solicitor for the trade assignees shall in no case be allowed the costs of the

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Ex parte
BURGHES,
re
BURGHES.

Friday,
May 31st.

Audit; Trade
assignee;
Costs.

The solicitor
for the trade
assignee will
not be allowed
his costs of the
audit, unless he
attends the
sitting.

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audit, unless he shall attend the sitting, and make a memorandum to the effect that he has perused and approves of the accounts.

(Before Mr. Commissioner FANE.)

Wednesday,
June 5th.

Re WILLIAM LEE.

Construction
of Bankrupt
Statute, sec.
257.

Where the assignees have obtained the certificate under the above section, an individual creditor is not barred from obtaining a like certificate also, and the bankrupt may be taken on both certificates.

THIS was an application by a creditor under sec. 257 (a) of the Bankrupt Law Consolidation Act, 1849, by which it is provided, that each creditor who proves under a bankruptcy shall be deemed a judgment creditor, and upon application shall have a certificate of the fact from this Court; upon which certificate he may obtain from the proper officer of one of the superior courts at Westminster the common writ of *capias*, under which he may imprison the bankrupt, if this Court refuses to protect him. That clause is one of twenty-five clauses in the New Bankrupt Act, constituting a code of commercial offences and punishments. They are all embraced in the 39th subdivision of the Act, and are all headed by the formula,—“And with respect to offences against the law relating to bankrupts, be it enacted, &c.” Hence it is appa-

(a) That the assignees for the time being of the estate and effects of any bankrupt, when the accounts relating to his estate and effects shall have become records of the court, shall be deemed judgment creditors of such bankrupt for the total amount of the debts which shall by such accounts appear to be due from him to his creditors; and every creditor of any bankrupt, immediately after the proof of his debt shall have been admitted, shall be deemed a judgment creditor of such bankrupt to the extent of such proof; and the Court, when it shall have refused to grant the bankrupt any further pro-

tection, or shall have refused or suspended his certificate, shall, on the application of such assignees, or of any such creditor, grant a certificate under the seal of the Court, in the form contained in Schedule Ba, to this Act annexed; and every such certificate shall have the effect of a judgment entered up in one of her Majesty's superior courts of common law at Westminster, until the allowance of the certificate of conformity of such bankrupt, and the assignees, or the creditor, shall be thereupon entitled to issue and enforce a writ of execution against the body of such bankrupt, &c.

rent that the object of that clause was not to enforce the payment of a debt, which, generally speaking, is the object of the writ of *capias ad satisfaciendum*, but to inflict punishment upon fraudulent debtors. The first bankrupt law, the 34th and 35th of Henry VIII., was a law of great severity. The whole property of the debtor was to be seized and distributed, and if the creditors were not paid in full, they were, by sec. 6, "to have their remedy for the recovery and levying of the residue of the same debts against the said offender, in like manner as they might have had before the making of the Act;" in other words, they might throw their debtor into prison, and keep him there. A milder spirit afterwards prevailed, and the Chancellors, of their own authority, established that creditors should elect either to come in under the commission and abandon their common-law rights, or retain their common-law rights and give up all claim under the bankruptcy; and at last, after the lapse of two centuries, that principle was adopted into the law by the 49 Geo. 3, c. 121, s. 14, whereby it was enacted, that proving or claiming a debt should operate as an abandonment of all right to proceed against the bankrupt's person. But, in making this law, it was not sufficiently considered that it would protect from imprisonment not merely the unfortunate and honest, but such persons as were described in the preamble to Henry VIII.'s law,—“persons who, craftily obtaining into their hands great substance of other men's goods, did suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to any of their creditors their debts and duties, but at their own wills and pleasures consumed the substance obtained by credit of other men for their own pleasure and delicate living;” for the enactment was, not that debtors should be protected as the result of an inquiry showing that they were proper objects of compassion, but that no creditor should even be permitted to inquire, without abandoning beforehand his right of assisting to punish the debtor, even if the inquiry should prove him to be a knave.

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Irregular attempts were occasionally made to evade this somewhat unreasonable enactment. Creditors met and entered into a sort of conspiracy, by which it was arranged that some should prove and obtain the right of inquiry, and others should abstain from proving, and retain the right of imprisoning, if the Court refused the certificate. But these irregular devices were of little real use. Debtors disposed to play the knave felt that they could do so with practical impunity, frauds increased, and credit was injured. Complaints became universal, and at last Parliament resolved that some method should be adopted of punishing fraudulent debtors by imprisonment. At first it was suggested that power should be given to the commissioner to inflict imprisonment at his discretion. This, however, was thought to be intrusting too much power to individuals, and ultimately it was determined that certain offences commonly committed by fraudulent debtors should be specified, and that where a debtor had committed one or more of the specified offences, the commissioner should be required to withhold protection; the assignees and each creditor should then be raised by a cheap and speedy process into the position of judgment creditors, and be armed with the common-law writ of *capias*; and if, under such process, the debtor was taken to prison, he should not be released until after the lapse of one year, except by order of the commissioner. The advantage of this method of proceeding was, that no debtor could be punished by the commissioner without the aid of either the assignees or a creditor, nor by a creditor without the previous assent of the commissioner; so that the concurrence of the Court and one creditor at least was necessary; and if the debtor was actually imprisoned, his imprisonment could not continue longer than an impartial person might deem necessary for example sake. This plan was carried out by clauses 256, 257, and 259 of the New Bankrupt Act; and, as their object was punishment, in the 39th subdivision of the Act, which related to offences and punishments, clause 256 points out the offences to be thus

punished, dividing them under nine heads, and it positively forbids the commissioner to grant to any bankrupt who has committed any of the offences there enumerated any further protection from arrest; clause 257 makes the assignees and each creditor judgment creditors, and points out how they shall be enabled to arrest the bankrupt; and clause 259 provides that the bankrupt shall not be released under one year's imprisonment, except by order of the Court. Such being the history of these enactments, it is impossible to doubt that the intention of the Legislature, in thus enacting, was, not to use the writ of *capias* for its ordinary purpose,—that of compelling payment of a debt,—but as an instrument of punishment. To apply these observations to the case now before me. The bankrupt Lee had behaved extremely ill to his creditors in many respects, but he had also committed one of the offences specified in chap. 256,—that of putting a creditor to unnecessary expense by vexatiously defending an action. I therefore felt myself bound to refuse protection, in obedience to clause 256. As soon as I had pronounced my judgment, refusing protection, I was requested by the assignees to grant them, under clause 257, the power necessary to enable them to punish the bankrupt. I of course granted it, and I was then asked by the creditor who had been wantonly put to expense to grant him a similar one also. To this it was objected for the bankrupt, that, as I had granted a certificate to the assignees, I could not, under clause 257, grant another to an individual creditor: first, because the language of the clause was in the alternative,—“on the application of the assignees or of a creditor;” and secondly, because it was inconsistent with old and recognized principles, that a debtor should be in execution at the suit of two persons for the same debt, which the bankrupt would be, if imprisoned by the assignees as trustees for all the creditors, and again by one of the creditors for whom such assignees were trustees. I have carefully considered both these objections, and am of opinion that there is no weight in either of them. As to the latter—namely, that it is contrary to recog-

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nized principles that a debtor should be imprisoned at the suit of two persons for one debt—the answer is already given, that the object of this imprisonment is not to compel payment (even instantaneous payment would not end the imprisonment); the object is punishment, and that being so, the old principle has no application here. As to the first objection, founded on the language of the clause, I am of opinion that the true meaning of the clause is, that the commissioner must grant the certificate to all who apply. The object of the enactment being punishment of the guilty, Parliament must have intended that all who would assist in inflicting that punishment should receive the utmost possible assistance, for no evil can arise from the reasonable punishment of the guilty. If this Court were to hold otherwise, it would lay itself open to fraudulent devices, through which the guilty might escape. Under the present system of electing assignees, assignees in league with the bankrupt may be easily elected, as they often have been; and in all such cases the assignees would instantly ask for the certificate, to prevent others from obtaining it, and would then take care not to use it; and thus the ends of public justice would be defeated. Such frauds were formerly committed as to commissions and fiats, whilst only one was allowed to exist at a time. They were taken out by persons in league with the debtor, to prevent their being taken out by a creditor really hostile. It would be a most dangerous interpretation of this new law, to expose it to such evasions. On the other hand, no mischief can arise from the issue of any number of certificates, for all can lead to but one imprisonment, and that imprisonment will cease when the Court is of opinion that it ought to cease, having regard to the offences of which the bankrupt may appear to have been guilty. Upon the whole, therefore, I feel myself bound to grant a second certificate to the individual creditor.

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June 11th.

ALL the facts are contained in the judgment.

Cooke was counsel for the bankrupt ; *Lawrance*, solicitor, opposed ; *Espin*, solicitor, for the assignees.

JUDGMENT.

Mr. Commissioner FANE.—This is a very remarkable case, and very unlike those which usually appear in this Court. The bankrupt, on coming of age in 1845, found himself entitled to a fortune, left him by an uncle who died about 1825, which, with its accumulations, amounted to 100,000*l.* and upwards. He was also entitled, under his father's will, to a reversionary interest in 6,000*l.*, payable at the death of an aunt. His father and uncle had been partners in the brewery of Combe, Delafield, and Co., and he was admitted into the partnership on coming of age. He thus became entitled to interest on his capital of 100,000*l.* at 5 per cent., and to a share in the annual profits besides, which usually amounted to about 2,500*l.* He had, therefore, an income of about 7,500*l.* a year. By the end of 1848 he was a ruined man, and on the 12th of July the fiat issued against him. His debts are 33,000*l.*, his assets about 1,000*l.* His affairs have been fully investigated ; his creditors are satisfied that the truth has been told ; his last examination was passed without opposition ; and he now asks for his certificate. The assignee objects, partly on public and partly on private grounds. The public grounds resolve themselves into reckless personal expenditure, and an unfair making away with his remaining assets shortly before his bankruptcy. The private grounds have reference to a loan by the assignee to the bankrupt in March, 1846.

Certificate ;
Where the
Court will not
annex condi-
tions to the
certificate ;
Opposition
by creditors
who were co-
speculators
with the bank-
rupt ; Excep-
tions to general
rules of conduct
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Before considering the objections, I will trace shortly the progress of this unfortunate young man from affluence to utter destitution. Having received the usual school education, he was sent to Oxford, where he continued about three years, during which time he exceeded his allowance, 3,000*l.* and upwards. He was anxious, immediately on coming of age, to pay the debts he had incurred, but was unable to do so, the very large sum left him by his uncle not being immediately accessible; and in consequence he borrowed of the gentleman, who afterwards became petitioning creditor and assignee under the bankruptcy, 4,600*l.*, with which, and other advances, he cleared off his debts. In November, 1845, he was admitted, as I have above said, partner in the brewery, and became master of his fortune. Unfortunately for him, he was under the influence of a strong passion for music, and hence for theatrical entertainments, which brought him into contact with persons willing to avail themselves of his want of experience and carelessness about money, to involve him in speculations, the risk of which he was to run, and the benefit of which they were to enjoy. In 1846 he was induced to assist in bringing over the Brussels Operatic Company to sing in this country. This speculation turned out a total failure, and he lost by it 2,300*l.* and upwards. It would have been well if this trifling loss had operated as a warning to him not to engage in undertakings, the details of which he neither did nor could understand. However, it did not; and in 1847 he withdrew his capital from the brewery, and entered into the speculation which soon completed his ruin. The history of this transaction will best be given in his own words. His Honour then took up *The Times*, and read from it the following extract of Mr. Delafield's evidence:—

“I know Thomas Frederick Beale, of 201, Regent-street. I first became acquainted with him in the spring of 1847. He was then engaged as manager of the Royal Italian Operahouse, Covent-garden, for Signor Persiani, who was at that time the lessee. Some time in July, 1847, Beale came to

me, when I was in my box at the theatre, and told me Persiani had left, and that money was required to pay the artistes, or else the theatre must close ; and said, if I would lend him my promissory note for 3,000*l.*, the Union Bank or his father would discount it, he promising, with Mr. Chappell, his solicitor, who was then present, to provide for it at maturity. I consented to this, and gave my promissory note the following day ; and this promissory note was afterwards represented by bills, for which I was ultimately obliged to pledge my reversion of 6,000*l.*, as mentioned in my examination yesterday ; no part of this 3,000*l.* was ever repaid to me either by Beale or his attorney. When I gave this bill, I had no connexion with the theatre beyond having my box there. I had no motive in giving this bill, except to assist the concern. This was my first introduction into the pecuniary affairs of the theatre ; and subsequently, about the end of that season (about August), Mr. Beale induced me to join him in partnership, and some memorandum of agreement was prepared by Mr. Chappell, Mr. Beale's solicitor, of which I have no copy, but believe the terms were, that I was not to incur any liability, present or future, beyond the sum of 15,000*l.* There was a provision, I believe, in the agreement, that Beale was to be at liberty to make any arrangements he could with Persiani for obtaining the theatre ; and I believe Beale arranged with Persiani to pay all the debts upon the theatre, to continue the existing arrangements, and to release Persiani from all liabilities, upon condition of Persiani giving Beale two acceptances of 2,100*l.* each ; and Signor Salvi, who was a friend of Persiani's, also agreeing to give four acceptances of 1,000*l.* each, making together 8,000*l.* By the power thus given to Beale, he took upon himself to pay the whole of the existing engagements of the theatre, the whole of which ultimately fell upon me, as Beale paid no part of them. Persiani's bills were all dishonoured, and have never been paid ; Salvi paid three of his acceptances by an engagement, but the balance of the fourth acceptance, I believe about 640*l.*,

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still remains due ; and I understand that Mr. Beale has recently given up this fourth acceptance to Signor Salvi, but without my authority ; and I consider this belongs to my estate. Persiani's acceptances were given to him afterwards, with my concurrence ; by this arrangement of Mr. Beale's, throwing the liabilities of the former lessees upon me, I had to pay nearly 20,000*l*. The opera season having terminated in August, 1847, nothing further was done, except making engagements for the ensuing season, until November, 1847, when a partnership-deed was executed between me and Beale. Beale did not bring anything into the concern ; the partnership between me and Beale was dissolved in December, 1847 ; I, by the terms of the dissolution, taking upon myself all the debts of the theatre, and releasing Beale from all contribution towards the debts and engagements of the theatre. Beale then ceased to have any connexion with the theatre. Beale has never advanced me any money until Friday, the 20th of April, 1849, when he advanced, at my request, 1,000*l*. to pay Grisi and Mario. On the 21st of April, 1849, I executed to Beale an assignment of all my interest in the theatre and the theatrical properties, as also all debts due and owing to me from subscriptions or otherwise, on account of the theatre. The assignment was executed in consideration of the 1,000*l*. advanced on the previous day, as also any further sums he might pay for me on account of the theatre, not exceeding in the whole the sum of 7,000*l*. : this assignment was prepared by Mr. Chappell, Mr. Beale's solicitor. I told Beale on Sunday morning, the 22nd of April, that I was going on the continent, to get out of the way of arrest. The deed, although dated on the 21st of April, was not, in fact, executed by me until the evening of Sunday, the 22nd of April. At the time I had this conversation with Beale on Sunday morning, he knew the deed had not been executed. I know Beale approved of my going away, but I do not remember whether the suggestion came from him or from me. When I met Beale at Mivart's Hotel, on Sunday morning, the 22nd of

April, I made out a statement of the accounts then due for salaries ; they amounted to 4,000*l*. I told him, and he knew well, I had no means of paying any part of this sum, and I had not, in fact, at that time any property whatever. In addition to the sum of 4,000*l*. due for salaries, there was a sum of 2,500*l*. for arrears of rent. I told Beale this, and he told me Mr. Chappell, his attorney, had seen Mr. Surnam, the solicitor for the lessors of the theatre, and had made an arrangement with him for the payment of the arrears of rent weekly. I left no money either with Beale or William Hugh Fenn, the treasurer of the theatre, to pay any of these sums, because I had no money. I now recollect, and wish to state by way of explanation, that the conversation between me and Beale as to the debts and engagements of the theatre, took place on Sunday, the 15th of April, at Mivart's Hotel. I know it was on Sunday, the 15th of April, because on the morning of that day Mr. Appleby, my solicitor, and Mr. Fenn, the treasurer of the theatre, called upon me at Mivart's, to confer upon the state of my affairs, and afterwards, at my suggestion, Beale was fetched from his house, Finchley-road, to Mivart's Hotel, where this conversation took place, and he then agreed to enter into the arrangement which was afterwards carried out by the deed of the 21st of April. I saw him daily between the 15th of April and the 21st of April, and we frequently conversed upon my intended departure from England, and Chappell, his solicitor, also knew it. No time for my return was mentioned, either by them or by me ; in fact, my return was quite uncertain. I also, on the 1st of May, 1849, executed, in conjunction with Mr. Henry Arthur Webster, to Mr. Thomas Frederick Beale, a conveyance of all interest I had in the Willow Bank estate, and in the furniture, fixtures, and effects there, to secure a sum of 7,000*l*. This deed was prepared by Mr. Chappell, and executed by Mr. Webster and me at Brussels. When Mr. Webster executed the deed, he received, I believe, 250*l*. from Mr. Appleby, who brought the deed over ; but I received nothing, nor have

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I since received anything from Beale. I believe it was also agreed that Webster should, in addition to the sum of 250*l.*, receive from Beale 75*l.* monthly, during the time Beale kept open the theatre. When I had executed this deed of the 1st of May, 1849, I had no property whatever left, and this Beale knew perfectly well, for I had had many conversations with him on the state of my affairs before the 21st of April. I was, in fact, entirely ruined at the end of the season 1848. My balance at my banker's was quite exhausted, and I began the opera season of 1849 by a loan of 2,000*l.* from my bankers."

The folly of entering upon such an undertaking without any experience to guide him, is obvious. The result was a balance of loss on the season of 1848 of 34,756*l.*, and on the season of 1849 of 25,455*l.* Even this gigantic undertaking did not satiate his passion for ventures connected with music and theatrical entertainments, for, in the early part of 1848, he also undertook to make advances to Mr. Charles Mathews to carry on the Lyceum on joint account. This project was soon found to be unprofitable to him, and he withdrew, after having sustained a loss of 5,312*l.* Pending these proceedings, he had made a present of 5,000*l.* to a musical acquaintance of his, Mr. Arthur Webster, with which Mr. Webster had purchased a villa on the banks of the Thames, called Willow Bank, and as it was thought desirable that the villa should be improved, he agreed to assist Mr. Webster in repairing or rather rebuilding and decorating it. For this he ultimately paid about 8,300*l.* The result of all is told by himself in these words:—"I was, in fact, entirely ruined at the end of the season 1848. My balance at my banker's was quite exhausted, and I began the opera season of 1849 by a loan of 2,000*l.* from my bankers." As the season advanced, his distress for money increased, and in April Beale was obliged to advance 1,000*l.* to pay Grisi and Mario. On the 15th or 22nd, Beale and the bankrupt met, and an account was produced, by which it appeared that 4,000*l.* was then due for

salaries ; and in order to induce Beale to carry on the theatre, the bankrupt, on the 22nd of April, executed a deed, prepared by Mr. Chappell, Beale's solicitor, whereby he assigned all his interest in the theatre, theatrical properties, and debts due to him for subscriptions, to Beale, to cover such advances as he had made or might make to carry on the theatre, not exceeding 7,000*l.* ; and he himself retired to Brussels, to avoid arrest. On the 1st of May following he became party to another deed, by which Mr. Webster conveyed Willow Bank and the property there to Mr. Beale also, to secure 7,000*l.* ; and on the 12th of July following the fiat issued. Such are the circumstances of this lamentable case ; and it is now contended that I ought either to refuse the bankrupt's certificate altogether, or postpone the allowance of it for some time, or annex the condition that the bankrupt shall pay 10*s.* in the pound to his creditors out of any property which may hereafter come into his possession. I do not think, however, that I ought to adopt any one of these courses. The first charge made against the bankrupt, is that his expenditure was reckless. But what evidence is there to support this charge ? I have certainly heard, out of court, that a very extravagant style of living was indulged in at Willow Bank ; but Willow Bank belonged to Mr. Webster, and, for anything that appears to the contrary, the bankrupt was rather a guest there than anything else. But, whatever the fact may be, I have nothing to do with anything but what appears in evidence before me ; and all that is in evidence on the subject of reckless expenditure, is a statement in the balance-sheet, showing that the bankrupt's personal expenditure from November, 1845, to July, 1849, nearly four years, was 22,000*l.* ; from which must be deducted at least 3,000*l.* for college expenses prior to 1845, leaving, therefore, a personal expenditure in that period of 19,000*l.* only—less than 5,000*l.* a year. Now, this is not reckless expenditure in a person who had an income of above 7,000*l.* a year. In reference to this part of the case, allusion was made to the gift of 5,000*l.* to Mr. Webster, and the sub-

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sequent expenditure of 8,300*l.* for his benefit. As to this, the bankrupt's excuse is, that Mr. Webster had lent him money to enable him to meet his early difficulties, and he also anticipated a marriage between Mr. Webster and a near relation of his. But it is scarcely necessary to notice these explanations. The 5,000*l.* was given on the 27th of February, 1847, and on that day the bankrupt received 20,000*l.* from Messrs. Combe and Co., and when he engaged to pay for the improvements at Willow Bank he had still 80,000*l.* in reserve; and of course every person is at liberty to give away thousands out of his own money, if he chooses so far to depart from the ordinary usages of mankind. The only other charge made against the bankrupt on public grounds, was that he had made away with all his remaining property in favour of Beale, just on the eve of bankruptcy; and this charge was founded on the execution of the two deeds of the 22nd of April and the 1st of May, 1849. Now, it has always been considered by me as a very important part of my duty here, to impress on all traders, that although they are at liberty to struggle for a living as long as there is a fair chance of success remaining, and their creditors are willing, by abstaining from pressure by suit to allow them to do so, still that they are bound, when all reasonable hope is gone and pressure by creditors begins, to look their affairs steadily in the face; and if they see no fair ground of hope, and some of their creditors will wait no longer, then to place themselves entirely in the hands of their creditors, and, if necessary, submit to bankruptcy, showing no favour to one creditor more than another. *Primâ facie*, the application of this principle to the present case would require condemnation of the bankrupt, for an unfair preference of Beale; but, upon full consideration, I am of opinion that this is an exceptional case. First, some allowance ought to be made for the extreme youth of the bankrupt; some for the circumstance that he could hardly be deemed a trader; some for the deception of which he has been made the victim, and some for the greatness of the ruin

which has befallen him, which of course must operate in itself as severe punishment. But I have another difficulty in dealing with this part of the case on the strict principle, and that is, that the assignee has thought it best to settle all questions with Mr. Beale, by accepting from him 1,000*l.* in satisfaction of all claims, and hence there has not been that full investigation of the facts connected with the execution of the two deeds, which would be requisite to enable me to form a judicial opinion on the merits of the transactions. An obvious excuse, however, offers itself for the execution of the deed of the 22nd of April; that April was the very commencement of the Covent-garden Opera season, and the bankrupt might have thought, that, in inducing Beale to furnish funds to go on with, he was doing the best he could for the creditors, whose immediate subsistence and ultimate payment depended on the theatre being kept open. With regard to the deed of the 1st of May, it seems that the bankrupt was, in fact, not a conveying party; it related to Mr. Webster's property, and it was only executed by the bankrupt in order that any subsequent purchaser under Beale might be better satisfied. Under these circumstances, and having regard to all these considerations, I do not feel myself in a condition to pronounce judicially that the certificate ought to be postponed in respect of the alleged unfair disposition of property on the eve of bankruptcy. It remains to consider the private complaint of the assignee. He was a college friend, three or four years older than the bankrupt. In March, 1846, being then, it must be presumed, well acquainted with his young friend's carelessness about money, and his unfitness to be trusted with it, he thought proper to lend him 4,600*l.*, to be repaid at the option of either party, on twelve months' notice being given. In February, 1848, he or his friends commenced an action to recover the money immediately, with interest. The bankrupt paid the interest; but, as to the principal, he declined paying at that time, on the ground that he was entitled to twelve months' notice. The

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Semble—That the Court will not annex the condition that the bankrupt shall make payments out of his future estate, where he had no expectations of future estate when the debts were contracted.

assignee, knowing that the defence was right in point of law, submitted, gave immediate notice, and then renewed his action in February, 1849. Meanwhile, the bankrupt had involved himself in the Opera speculation, and was, in fact, utterly ruined. Now, is there anything in these circumstances that should deprive the bankrupt of his certificate? I think not. The defence he made was justifiable at the time. The lender had agreed that repayment should not be made except after twelve months' notice, and notice had not been given. But then it is insisted that I ought, in granting the certificate, to attach a condition, that the bankrupt shall pay 10s. in the pound on his debts out of future assets; and a decision something to that effect in Lord Huntingtower's case was cited to me. (a) I do not know the exact particulars of that case. I only know that the case was very peculiar; but I confess I have no inclination to attach such condition to a certificate in any case. I refused to do so in Jullien's. The world of industry in which we live is one in which every man not living on accumulations is struggling for a subsistence. In that struggle it is difficult enough for any one to win his way, even with character clear and something to begin with. What, then, may be expected to be the fate of one who not only begins with nothing, but is weighed down by the stain of bankruptcy, and by an unpaid debt of 10s. in the pound on 33,000*l.*? I see nothing for a person so burdened, but to lie down in hopeless despair, and abandon all future exertion. Were the faults of this bankrupt far greater than they are, I would not condemn him to such a fate. It may be said that this bankrupt has rich relations. Perhaps he has. But if it were true, this argument is one

(a) Lord Huntingtower was at the time of his bankruptcy entitled in expectancy to property of considerable value, and obtained credit in consequence of such expectancy.

Conditions to pay out of future estate have been annexed to the

certificates of bankrupts exercising some business dependent on professional skill, the same as to authors, on the ground that credit was given to them in expectation of the income that might arise from their skill or attainments.

which will never weigh with me. I will never be a party to the establishing of any such doctrine as that rich relations are under any obligation to pay the debts of extravagant connections. A contrary doctrine is a far more wholesome one. It is far better to lay it down that no creditor shall have any means of pressure, direct or indirect, upon rich relations, and thus check the giving credit to the young and foolish. It is the too great prevalence of this credit, which, in the long run, leads to the establishment of laws, which, intended to check the unwholesome credit only, which is given to the idle, such as that given in Lord Huntingtower's case, and again in this, have a tendency to impede that wholesome credit, which, by enabling struggling industry to exercise its calling, is the source of public wealth. And for whose benefit am I to impose this burden?—for that of the assignee, or for that of the general body of creditors? If for the assignee, I answer, that he knew at the time he lent the money that he was *lending to a spendthrift*; that the money was to meet past or provide for future extravagance. Why should the law go out of its way to aid such lenders? They are public enemies. They foster extravagance, encourage idleness, and disturb the happiness of families. Even those who advance money to enable others to educate themselves or go into business, must submit to the loss of what they have lent, if circumstances turn out unfavourable; and if this be the fate of those who advance money for praiseworthy purposes, why should it not be the fate of those who advance money to supply extravagance? Surely the loss of what has been so lent is a not inappropriate punishment for persons who thus interfere between the young and their natural advisers and protectors. But it may be said that I ought to impose this condition for the benefit of the other creditors. To that I answer, that I do not believe that there is even one who wishes it. I have now been engaged twenty-five years in administering the law of bankruptcy, and in that time I have observed that the most marked feature in the conduct

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of creditors, as a body, towards debtors, is an unwillingness to press harshly on the fallen ; and I doubt not that that is the feeling which pervades the body of creditors in this case. At all events, not one has appeared to make the slightest personal complaint against the bankrupt. But, if a contrary feeling did prevail, I should not yield to it ; for I look upon the general body of creditors, in this case, as co-speculators with the bankrupt ; and as the speculation has been a total failure, and he the greatest sufferer, all ought to bear their share of the misfortune, without refusing. On the whole, I think, upon full consideration of all the circumstances, that I shall best discharge my public duty by granting the bankrupt a common certificate, without attaching any condition to it. I hope that the terrible lesson he has received may be of use to him in after-life.

(Before Mr. Commissioner HOLROYD.)

Tuesday,
June 11th.

Re A TRADER-DEBTOR SUMMONS.

Disputing
debt ; Inform-
ality in notice ;
Practice.

The proper
time for dis-
puting the debt
of the sum-
moning cre-
ditor is at the
adjudication.

It is suffi-
cient that the
original notice
and particulars
of demand filed
are regular,
though the
copy served on
the trader is
irregular.

LUCAS, for the trader summoned.—We put in a deed of composition made between the trader against whom the summons is issued and his creditors, of whom the person who issued this summons is one, whereby, for the considerations therein mentioned, it is covenanted and agreed that the creditors shall not molest the trader in respect of their debts for a certain period, which has not yet elapsed. None of the considerations have failed ; the creditors are therefore now barred from taking such proceedings as the present. There is no debt in equity to support the summons. The notice requiring payment, and the particulars of demand, served on the trader, are informal—they are not signed by the summoning creditor.

Where the debt is disputable, the practice is for the trader summoned to file an affidavit that he has a good defence on the merits.

A *Solicitor*, contra.—The notice and particulars which have been served are copies; the originals, which are on the file, are regular.

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Mr. Commissioner HOLROYD.—The notice and particulars on the file seem to be regular;—that is sufficient. I have no jurisdiction to try whether the debt be good or not, till the adjudication of that proceeding shall hereafter take place.

Lucas then put in an affidavit that there was a good defence on the merits to the summoning creditor's debt.

The COURT, having read the affidavit, refused an application that the trader should execute a bond.

(Before Mr. Commissioner FONBLANQUE.)

Re TIDMARSH.

Wednesday,
June 26th.

THE bankrupt was heard on his application for his certificate on the 22nd of May, when the further consideration of his application was adjourned, in order to give him an opportunity of producing one James, whom he alleged to have been his intended partner, and on whose promise to advance a sum of money, he, the bankrupt, had commenced business.

Adjourned
certificate;
New notice of
opposition,
when neces-
sary.

This day the bankrupt did not appear.

Cooke, counsel for the assignees, moved that the question of certificate be adjourned *sine die*, and that special notice should be given of any application for a new sitting.

By the COURT.—Let the consideration of the certificate be

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adjourned *sine die*, and no application for a new sitting to be made till the bankrupt has paid the costs of, and occasioned by, this day's sitting. And in case any new sitting shall be granted, let one calendar month's notice be given to the assignees, and to every creditor who has proved, in addition to the usual advertisement.

Mem.—The Court laid down the rule, that notice of opposition, given between the day originally appointed for the hearing of a certificate and the day to which such hearing might be adjourned, was insufficient. This rule would not apply to a case of adjournment *sine die*, or to a lapsed sitting by default of the bankrupt's appearance; but that in such cases the proceedings must commence *de novo*.

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(Before Mr. Commissioner HOLROYD.)

Ex parte TRUSTEES OF DARTFORD SAVINGS BANK,
re JOSEPH JARDINE.

Friday,
July 5th.

THE facts appear in the judgment.

HIS HONOUR gave judgment as follows :—This is an application under the 28th section of the 3 & 4 Wm. 4, c. 14, by which it is enacted (among other things), that if any person appointed to any office in a savings bank, and being intrusted with the keeping of the accounts, or having in his hands or possession, by virtue of his said office or employment, any moneys or effects belonging to such savings bank, shall become bankrupt, his assignees shall, within forty days after demand made by two of the trustees of the savings bank, deliver and pay over all moneys and other things belonging to the savings bank to such person as the trustees shall appoint, and shall pay out of the estates, assets, or effects of such person all sums of money remaining due which such person received by virtue of his said office or employment, before any other of his debts are paid or satisfied. Now, it appears that Jardine (the bankrupt) had been for many years, and was at the time of his bankruptcy, actuary of the bank for savings for the town of Dartford and its vicinity, and whilst holding such office he received, at different times, moneys from depositors for deposits in the bank for their benefit, which he applied to his own use; and the trustees of the bank, having made the demand required by the above section, claim to be paid by the assignees the whole amount of the assets of the bankrupt's estate, upon the admission of the bankrupt that the sum of 2,130*l.* now remains due from him, and which sum the trustees of the bank say he received by virtue of his office or employment of actuary. The gross assets of the bankrupt's estate amount

The stat. relating to misapplication of moneys by officers of savings banks (3 & 4 Wm. 4, c. 14) must be construed strictly.

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to about 1,300*l.*, and the debts of the creditors who have proved to about 1,200*l.* By the terms of sec. 28 of the 3 & 4 Wm. 4, c. 14, which I have just stated, the assignees of the bankrupt (Jardine) are bound to pay out of his estate all moneys remaining due to the savings bank, which he received by virtue of his said office or employment of actuary, before any other of his debts are paid or satisfied: and the question which I am called upon to decide is, whether all, or any, or what part, of the sum of 2,130*l.*, claimed by the trustees of the bank, was received by Jardine by virtue of his office of actuary to the bank. The Dartford Savings Bank was established about the year 1816, and by the existing rules and regulations of the bank, made on the 5th of December, 1844, the institution is to be continued under the management of a president, vice-president, trustees, and a committee. By rule 3, the officers and committee are appointed as named at the end of the rules, and they embrace a president, a vice-president, twelve trustees, and a committee consisting of fourteen gentlemen for Dartford, and a less but varying number of gentlemen for seventeen parishes in the neighbourhood, and then follow the names of the treasurer, actuary, and secretary. The bankrupt is named as the actuary. By rule 12, the bank shall be open for receiving deposits on Saturday in every week, from eleven to one, or at such other hours as shall from time to time be thought convenient by the managers, at the house of the bankrupt, in Dartford, or at such other convenient place as shall be appointed by the officers and committee, of which due notice shall be given, when the committee, or some one or more of them, according to a rota to be settled between them, shall attend to receive deposits and pay money out. By rule 13, the deposits are to be entered in the books of the institution at the time they are made, in the presence of the depositor and one of the officers or committee, and a similar entry shall be made in a small book, to be provided at the expense of the institution, which must be brought again by the depositor upon every subsequent payment. By rule 14, not more

than 30*l.* can be received from any depositor in one year, nor more than 200*l.* in the whole. This is in conformity with the provisions in the 35th section of 9 Geo. 4, c. 92, which makes it unlawful for the trustees to receive more than 30*l.* from any one depositor in any one year. By rule 18, for the convenience of persons residing out of Dartford, their deposits may be received by any one of the officers or committee of their respective parishes, with all the advantages of the regulations, and the persons receiving the same shall pay the amount to the depository in Dartford, or to the treasurer, before the end of every month, when the same shall be entered in the books. By rule 25, whenever the money in the hands of the treasurer shall amount to 50*l.*, over and above such sum as shall from time to time be necessary to remain in his hands to answer the exigencies of the institution, the same shall be paid by the trustees into the Bank of England, on account of the Commissioners for the Reduction of the National Debt, upon receipts bearing a certain rate of interest. By rule 23, all orders upon the treasurer for the payment of money are to be signed by one of the committee. This rule embodies the provisions of the 7 & 8 Vict. c. 83, s. 4, that if any actuary, cashier, secretary, officer, or other person holding any situation or appointment in the bank, shall receive any sum or sums of money from or on account of any depositor, or person desirous of becoming such, or on account of such institution, and shall not, at the next day on which the said institution is opened for the receipt of deposits, account for and pay over the same to the trustees or managers thereof, or to such persons as may be directed by the rules of the institution, such actuary, cashier, secretary, officer, or other person as aforesaid, on being convicted thereof, shall be guilty of a misdemeanour. By rule 24, every depositor shall, once in every year at least, and at such place and time as the trustees from time to time shall appoint, cause his deposit-book to be produced at the office of the institution, for the purpose of being examined. This is required by the

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7 & 8 Vict. c. 83, s. 5. By rule 25, no trustee or manager shall be personally liable except for his own acts and deeds, nor for anything done by him in the execution of his office, except in cases where he shall be guilty of wilful neglect or default (referring to 9 Geo. 4, c. 92, s. 9) ; nor be liable to make good any deficiency in the funds, unless they have declared by writing under their hands, and deposited with the Commissioners for the Reduction of the National Debt, that they are willing to be so, and they may, in such case, limit the amount of such responsibility ; and then follows a proviso, that the trustee and manager of any such institution shall be, and is hereby declared to be, personally responsible and liable for all moneys actually received by him on account of, or to and for the use of, the institution, and not paid over and disposed of in the manner directed by the rules of the institution ; and refers to 7 & 8 Vict. c. 83, s. 6, which contains enactments to the like effect. Having now stated such parts of the Act of Parliament and of the rules of the institution as appear to me to be material to the consideration of the present case, I will proceed with the facts. The bankrupt, who had been actuary from the first establishment of the bank in 1816, for the first two or three years acted in conjunction with his father ; then, upon the proposal of his father, the bankrupt was appointed at a fixed salary ; and subsequently, in 1830, he entered into a bond in the penal sum of 150*l.* (with his father as his surety) for the faithful execution of his office. The bond was given to the clerk of the peace for the county of Kent, as required by the Act of 9 Geo. 4, c. 92, s. 72, and transmitted to the Commissioners for the Reduction of the National Debt, in pursuance of the 7 & 8 Vict. c. 83, s. 16. It is recited in the bond, that the bankrupt had been duly appointed actuary and cashier of the savings bank established at Dartford. The bankrupt performed the same duties after 1844, when the existing rules were made, and wherein he is called “ actuary,” as he had previously performed from 1816 to 1844 as “ actuary and

cashier." What duties he performed as actuary will best appear by his own examination ; and I will now read that part of it which bears upon this point :—

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"When, how, and by whom were you appointed to the office of actuary of the Dartford Savings Bank ?—I cannot accurately remember as to time, but I think it must be about thirty-four years since. No doubt by the then trustees. I do not remember the form of the appointment. I believe a minute-book was kept at that time. It never was in my possession, neither do I know in whose possession it was ; but I presumed it was in the possession of Mr. Strange, the then secretary. I have not seen the minute-book of 1816. I executed a bond, but I cannot give the exact date ; it appears by the copy bond now produced, that the bond was executed in 1830, the 17th April. I do not remember that I had executed any bond previously to the one a copy of which is now produced, nor have I executed any bond since that one. I entered on the duties of actuary in 1816. This was the first establishment of the savings bank. For the first two or three years, my father acted as actuary gratuitously ; subsequently, the duties became so onerous that my father proposed that I should act as actuary at a fixed salary of 5s. upon every 100*l.* standing to the credit of the depositors in the Bank of England received up to the end of the preceding year. With reference to my former statement, that I began to act as actuary in 1816, I wish to explain that my father and I acted in conjunction as actuary for the first two or three years. I continued to act as actuary from that time down to the date of my bankruptcy, and I have continued to receive that percentage from the time I have mentioned, about 1818 or 1819, down to Michaelmas last—I mean up to the time when the annual accounts are made up—I mean the 31st of October, 1849 ; this per-centage was paid out of the funds of the bank, as a current expense. It appears by the bond, I was appointed actuary and cashier ; I considered the terms iden-

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tical. There was not any difference in my duties after the year 1844. I continued to perform the same duties after that date as actuary as I had previously performed from 1816 up to 1844 as actuary and cashier.

“What were the prescribed duties of the office of actuary?

—To receive moneys, to repay moneys, to keep a weekly account of the business done, and to make a monthly return to the National Debt Office. In all cases it was the custom for the depositors to produce their books when they brought money to invest. It was my duty to enter into the depositors' books the moneys they brought to me to invest, and it was my invariable practice to enter the amounts so received; sometimes the depositors left their books with me, when the moneys were irregularly paid in after office hours, but in all cases I entered in the depositors' books the moneys I received immediately I received the book. Sometimes the book and money were sent by parcel, or by carrier, or by post; if I were not in the way, the money and books so received were labelled and put in a drawer appointed for the purpose, and brought to me by the young man in the shop, or by my son, when I was sitting at the table on the Saturday. This mode of transmission by parcel, post, and carrier, was not confined to any particular day of the week, or to any particular hour of the day. Taking the average of the week, I should think it occurred five or six times a week. I should think this practice has continued for several years, but not for the whole time. I cannot say when this practice first commenced. After the receipt of the depositor's money and the entry of it in the depositor's book, my next duty was to enter the money so received in the cash-book of the bank. That cash-book was kept by me. I did not always enter in the cash-book the amounts so received by me.

“Can you state the amount so omitted to be entered by you in the cash-book?—About 2,130*l*. I think.

“Supposing the moneys to be properly entered in the cash-book, what was your next duty?—To make up the weekly

account; I mean that no entry would be made in any other book until I made up the weekly account of cash receipts at the conclusion of each Saturday's business. The proper course of business would be to cast up the weekly receipts appearing in the cash-book, deduct the payments out to depositors and disbursements (if any), and carry the balance forward to the account required by the National Debt Office to be furnished, and the balance, if any, appearing on the account, should be paid to the treasurer. There was a ledger also kept by a clerk appointed for the purpose by the trustees, whose duty it was to post the cash-book, so that the state of each depositor's account might appear on the ledger; this ledger was posted up when it suited the convenience of the clerk, who was a farmer; he did it sometimes every four, five, or six weeks. He had no other means of making up the ledger accounts except the cash-book: the omission by me to enter in the cash-book the sums in respect of which I am a defaulter, necessarily caused the omission of those amounts in the ledger.

"Cross-examined by Mr. Jones.—You say that one of your duties was to receive moneys. On what day was it your duty to receive the moneys?—On Saturdays, between the hours of eleven and one.

"Was it your prescribed duty as actuary to receive money on any other day than Saturday, or on any other hour than between eleven and one on that day?—No.

"Have you received from managers at any time instructions not to receive moneys on any other day, or at any other hour?—I have no recollection of having received from the trustees a direct message for prohibiting that practice, but at a general meeting on the 24th day of January last, a trustee asked me if such was my custom, and I said 'Yes.' Thereupon there arose a question among the gentlemen present as to what degree of accommodation should be allowed to depositors, supposing one to have come from a distant place five minutes too late—whether a distinction should be shown between a rich

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and a poor depositor in that respect ; and the result was, that the chairman recommended me to adhere to the rules as closely as possible.

“ On your former examination, on the 10th of May last, you state that the managers had prohibited the receipt of money out of office hours. What do you mean by that statement?—I consider the publication of those rules is a prohibition to my receiving money out of office hours, and my doing so was an infraction of those rules.

“ Do you ever recollect having been reprimanded by any of the managers for having received money out of office hours?—I have no recollection of it.

“ Will you detail to me the strict course that you pursued previous to any of your defalcations?—I adhered strictly to the rules, except that I cannot say that I did not receive money out of office hours. I always had the cash-book at my house, and it was at my command at any moment, unless when with the clerk for the purpose of being posted. On Saturday, at one o'clock, I made up the account of the moneys received that day, and I always took the balance to the Dartford Bank, and paid it to the account of the treasurer, and received at that time a receipt acknowledging the receipt of the money for the account of the treasurer. At that time a manager was usually present, and I showed him the receipt of the money I had paid to the Dartford Bank.

“ Re-examined by Mr. *Lawrance*.—Do I understand you to say that a manager was usually present every Saturday down to the time of your ceasing to be actuary in the present year?—For the last three or four years usually not.

“ You have stated in a former part of your examination to-day, that your defalcations amount to 2,130*l.* in respect of sums not entered in the cash-book ; can you tell me how much of that sum was received out of office hours, and how much during office hours?—I cannot ; I have no means of telling.

“ Where was the savings bank held since 1816?—Always at my house, where I carried on my business as a draper.

There was a parlour facing the street used for the purposes of the bank. Until within the last three years the depositors could get at the parlour from the street, or through the shop, but then they usually came through the shop, and for the last three years the entrance from the street to the parlour has been closed up, and the only entrance used has been through my shop.

“ You are, I presume, aware of the 18th rule of the Dartford Savings Bank, which provides as follows :—

“ ‘ That for the convenience of persons residing out of the town of Dartford, their deposits may be received by any one of the officers or committee of their respective parishes with all the advantages of these regulations, and the person receiving the same shall pass the amount to the depositors, in Dartford, or to the treasurer before the end of every month, when the same shall be entered in the books.’ Do you know whether at the time these rules were issued in 1845 any of the officers of the savings bank resided out of Dartford ?—If I am to presume that all the gentlemen acting in the management of the savings bank were officers, then some of them did live out of Dartford.

“ Did the treasurer, actuary, or secretary reside out of Dartford, in 1845 ?—I believe they all lived in Dartford at that time. Mr. Pain, the secretary, has within the last three years gone to reside out of Dartford, at Crayford. I do not remember Mr. Pain having brought any money to me since he has resided out of Dartford, but several of the committee-men have. If I received money on a Tuesday, or on any other day of the week, I should enter it in the depositor’s book as received on the next following Saturday, and this was my practice, whether I received the money myself during the week, or whether it was brought to me by carrier, parcel, or post. There may be exceptions, but they would be errors of date ; and this was the course if the depositor brought his book to me on any other day but Saturday. I always dated it on to the following Saturday, and usually pointed out to the depositor what I had done.

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“Were not these moneys so received on other days besides Saturday sometimes immediately applied to your own purposes?—Yes; sometimes. All the moneys not entered in the cash-book were misapplied by me, whether they were received on a Saturday or on any other day of the week.

“What was the course of proceeding when a committee-man attended on Saturday to receive the deposits?—His duty was to verify the account in the cash-book, and sign it, and see the money was sent to the treasurer, and to see the receipt of the treasurer for the money paid in by me. For many consecutive months no manager attended.

“Do you know whether any arrangement was made by the committee as between themselves as to their attendance by rota at your house on the Saturday?—It appears by the minute-book, under date of the 24th December, 1831, that certain gentlemen were appointed by rota. I know that some of them have since died, or have removed, and I believe there has been no regular rota for the last three or four years. I mean that the vacancies by death have not been filled up; but, with the exception of the first two or three years after 1834, the attendance has been very irregular, gradually became worse, and the last year was the worst of all.”

The following is a copy of the minute just referred to:—

“BANK FOR THE SAVINGS FOR THE TOWN OF DARTFORD.

“At the general half-yearly meeting of the officers and committee of this institution, held at the vestry-room, Dartford, on Wednesday, the 4th day of December, 1834:—

“Resolved—That the following gentlemen do attend in rotation at the house of Mr. Jardine, between the hours of eleven A.M. and one P.M., on Saturdays, for the purposes of the savings bank; viz.—Mr. J. Hammond, in January; Mr. Tasker, in February; the Rev. H. Stevens, in March; J. Colver, Esq., in April; the Rev. G. F. Otley, in May; the Rev. Archdeacon King, in June; the Rev. F. Heberden, in July; Thomas B. Fook, Esq., in August; the Rev. Mr.

Crichton, in September; the Rev. A. W. Burnside, in October; the Rev. T. B. Grant, in November; Mr. John Finch, in December."

"Did the treasurer attend the Saturday meetings?—No, he did not.

"Did any one of the depositors in any one year, from Michaelmas to Michaelmas, pay in a larger deposit than 30%? —It appears by Woodin's book now produced there was a sum of 60% received between the 31st of October, 1848, and the 31st of October, 1849, but I cannot explain it, as I was reduced to such expedients at that time. I believe the private memorandum deposited with the official assignee will explain it all."

The bankrupt stated in a previous examination that no manager was present when he received moneys which he omitted to enter in the cash-book. It appears by the foregoing examinations of the bankrupt, that the amount of his defalcations is made up of moneys received by him at his house (the depository of the bank), on the Saturdays, within the office hours, inserted in rule 12; of moneys received by him at his house and on other days than Saturdays; and of moneys remitted to him, together with the depositors' books by parcel, carrier, or post, and which, when he was not in the way, were labelled, put in a drawer appointed for the purpose, and brought to him on the Saturday by one of his own family. When the bankrupt received moneys at his own house on other days than Saturday, he entered them in the depositors' books as received on the next subsequent Saturday, and, in some instances, he applied to his own purposes the moneys which he received, immediately after he received them, and he says that he has no means of telling how much of the amount of his defalcations was received out of office hours, or how much during office hours, and it seems not ascertainable how much of it was received by, or was in the possession of, the bankrupt on the Saturday, and how much was received by him on other days than the Saturday, and misapplied

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immediately, or before or after the Saturday next subsequent to the receipt thereof. Now the provision of the 3 & 4 Wm. 4, c. 14, s. 28, in favour of the trustees of savings banks over the other creditors of any of their officers, is similar to that which was previously applicable to friendly societies. Lord Eldon truly said that this provision was a very harsh operation upon other creditors, excluding every fair, honest demand from sharing equally with these societies. See *Ex parte the Stamford Friendly Society*, 15 Ves. 281. In another case, *Ex parte Ross*, 6 Ves. 804, his lordship designated this provision in favour of friendly societies as being "more liberal than just, that all creditors, however meritorious, should be sacrificed to their demands." It is also, I think, worthy of the consideration of the legislature whether this provision be not impolitic as well as unjust, as being calculated to induce a laxness in the managers of these institutions to the duties imposed upon them, and an inclination on their part to be less vigilant and watchful over their officers than a due regard to the interest of the depositors demands at their hands. It is not, however, for my consideration whether this is a reasonable provision, but at least those who claim the preference, and more especially persons who are seeking to relieve themselves from losses, incurred (it is true) by the treachery of a servant, but of one whose acts were in a great measure facilitated by the negligence of the managers of the bank, and the irregular mode in which they allowed the business of the bank to be conducted, ought not to be permitted by it. The bankrupt's defalcations commenced and have been going on since 1844, when a manager ceased to attend on the Saturdays, as required by rule 12. And I may here also observe, that by the minute-book of the institution it seems that only three quarterly meetings, constituted as required by rule 7,—namely, one in July, 1844; one in January, 1845; and one in April, 1846,—have been held between April, 1843, and October, 1849; a period of six years and a half. As to all the others, according to the entry in the minute-book, Mr.

Jardine and Mr. Pain, the secretary, only were present ; and I find no entry in the minute-book of any annual examination of the depositors' books, as required by rule 24. I believe the only entry on this subject is under the recent date of the 21st of January, 1850, since all the mischief has happened. Then the rota for the attendance of the committee on the Saturday was fixed in 1834: since that time deaths and removals have occurred, but the vacancies have not been filled up. With the exception of the first two or three years after 1834, the bankrupt says, "the attendance has been very irregular ; it gradually became worse, and the last year was the worst of all." I say in such a case the trustees must show their right to the preference which they seek, clearly and distinctly, and in the way pointed out by the Act of Parliament. This was the opinion of Lord Eldon, in *Ex parte the Stamford Friendly Society*, 15 Ves. 251 ; and in *Ex parte Haynes*, 3 M. D. & D. 669 ; in *Ex parte Harris*, 1 De Gex, 162 (cited by Mr. Jones) ; and in *Ex parte Whipham*, 3 M. D. & De Gex, 570. His Honour Vice-Chancellor Knight Bruce, considering a claim of this sort "against common right," also held that the trustees must bring themselves clearly within the enactment on which they rely as entitling them to such a privilege. Care should be taken not to enlarge the construction of the statute. The cases also of *Ex parte Ashly* and *Ex parte Corser*, 6 Ves. 441 ; *Amicable Society of Lancaster*, 6 Ves. 98 ; *Ex parte Ross*, 6 Ves. 802 ; *Ex parte Buckland* (cited by Mr. Jones), Buck. 214 ; and *Re Heanor Friendly*, 1 Beav. 511, show that the Act is to be construed strictly. In *Ex parte Riddell*, 3 M. D. & De Gex, 80, cited by Mr. Lawrance, the Vice-Chancellor considers his decision in that case as entirely consistent with cases in 6 and 11 Vesey, and the case in Buck. The preference, then, is given in respect of money received by officers of savings banks, by virtue of their offices or employment. To bring this case within the words "by virtue of his office or employment," it must, I think, appear either that the bankrupt had authority, under the rules

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of the bank, to receive the money of depositors at any time or place, with reference to the whole amount of the bankrupt's defalcations, or at his house on the Saturdays within office hours, with reference to the amount which the trustees can establish to have been so received, or that the office of actuary was of a description from whence such extended or limited authority must necessarily be inferred. The rules of the bank contain no directions for the actuary to receive deposits, or to pay money out; on the contrary, by rule 12, some one or more of the committee are to attend for that purpose. Looking to the rules as the guide, the course of proceeding would be this:—One of the committee, according to a rota fixed between them, would attend on the Saturday, at Jardine's house, between eleven and one o'clock, to receive deposits and to pay money out; the actuary, who kept the cash-book, would enter therein all receipts and payments; orders upon the treasurer for payment of money would be signed by the committee-man. At the end of the time allotted for receiving and paying, the actuary would make up the week's account, showing the sums received, the sums paid, and the balance at the close of the day in the hands of the treasurer. A monthly return should be sent to the Commissioners for the Reduction of the National Debt, containing an account of each week's business, and certifying that the sums of money therein stated to have been received and paid from and to depositors were received and paid in the presence of the managers and the actuary (or the secretary), whose signatures were attached, in the office or place appointed by the rules and regulations for conducting the business of the bank, and then showing how the balance of each week is disposed of. Thus—

“ Remaining in my hands £

“ A. B., Treasurer.

“ Witness our hands,

“ Present at the above savings
 bank during the receipts } “ C. —, Manager.
 and payments. } “ D. —, Secretary or Actuary.

“The notices to withdraw (including all the outstanding notices) on this day amount to £ .”

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A like entry is signed in a similar manner for the other three weeks ; and if any order has been made for investing any part of the balance in the fourth week, the amount is stated at the end. The rule 23, which was adverted to by Mr. Lawrance, and which contains the enactment of the 7 & 8 of Vict. c. 83, s. 4, making it a misdemeanour not to pay over within a certain time, to the trustees or managers, or such person as may be directed by the rules of the institution, any sum of money received by any actuary, cashier, &c., certainly shows that the legislature contemplated the possibility of an actuary receiving money on account of the bank ; but the same observation applies to any “secretary, officer, or other person holding any situation or appointment in the savings bank,” for the penal provision against the omission to pay over any sum of money extends to all these persons ; it is not a criminal act in any person to receive money for the bank, but it does not therefore follow that any one of the officers before mentioned, or any other person holding any situation or appointment in the savings bank, has authority, by virtue of his office or employment, to receive money from depositors. Undoubtedly the rules might have authorized the actuary to receive deposits, and the rules of some institutions do so, and sometimes in conjunction with one of the managers ; but the rules of this institution seem to exclude the actuary from this duty by throwing it upon the committee-man solely. If the managers of the bank were desirous that the actuary should be authorized to receive deposits, they might have altered the rules for that purpose in the mode pointed out by rule 5. No alteration, however, has been made in the rules. Next, was the office of actuary of a description whence an authority to receive money from depositors must necessarily be inferred ? I think not. The word “actuary” is a term of the civil law. He is the registrar, or notary, who keeps minutes of the proceedings or

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acts of a court. In the Eastern empire, the actuarii were properly officers who kept the military accounts. The name has been assumed of late years by officers of different societies, more particularly insurance companies, savings banks, friendly societies, and other officers requiring calculations, and the principal duty of an actuary is now generally considered to be of this latter description. Whatever inference might have been drawn from the nature of the office of "actuary," coupled with the term "cashier," in the absence of any rule as to the receiving of money, it cannot, I think, be inferred in the present case that the actuary had authority to receive money from depositors, the term "cashier" having been dropped since 1844, when the rules were revised, and the rules also prescribing that one of the committee is to attend for the purpose of receiving deposits. Notwithstanding, therefore, the bankrupt was originally appointed "actuary and cashier," and although he had stated in his examination that he considered the terms identical, and that his duty was to attend on the Saturday, and to receive deposits and to pay money out, within the office hours mentioned in rule 12, and that he performed this duty for a series of years, I cannot say that he received any moneys by virtue of his office of actuary, so as to give to the trustees the preference which they seek over the other creditors of the bankrupt. I think that the moneys which he received on the Saturdays at his house, within office hours, must be considered as having been received by him by permission of the respective committee-men, whose duty it was to have attended to receive such moneys, and not by virtue of the office of actuary. In the case (cited by Mr. Jones) of *Ex parte Buckland*, Buck. 214, the petition was dismissed, on the ground that the person who received the money, though an officer of the society (he was a clerk of the society), was not the person authorized by the society to receive the money. Gentlemen who lend their names to these societies, and consent to act as managers or committee-men, wish to be free from responsibility for the acts of the subordinate officers; they

should be very cautious how they lightly neglect to conform to the rules imposing certain obligations upon their time and attendance. For, if a committee-man, whose duty it is to attend upon any particular Saturday to receive deposits, stay away, and allow the actuary to act for him, it is by no means improbable that the actuary, in so receiving moneys, might be regarded as the servant of the committee-man for whom he was acting, so as to make such committee-man personally liable under rule 25, as for moneys actually received by the committee-man, considering the receipt of the moneys in such case by the actuary as the receipt of the committee-man himself. But taking the bankrupt's own view of the authority which he had by virtue of his office, evidenced by the course which he pursued for so many years, under the sanction of the managers or committee, his duty was confined to receiving deposits, and paying money on the Saturday, within office hours, and he could not legally receive more than 30% from any one depositor in any one year. No evidence, however, has been adduced before me to enable me to say to what amount the bankrupt has been a defaulter in respect of moneys received by him under the authority with which he considered that he was invested. Mr. Lawrance, indeed, contended that, under rule 18, which says that, for the convenience of persons residing out of the town of Dartford, their deposits may be received by any one of the officers or committee of their respective parishes, the bankrupt, as an officer of the bank, was authorized to receive moneys from persons residing out of the town of Dartford; but I am of opinion that the words "the officers," as used in conjunction with and before the words "and committee," in that and several other of the rules, mean the officers having direction in the management of the institution, and do not include the paid officers of the institution, as the clerk, secretary, and actuary, who, under rule 10, are appointed by "the officers" and committee. For these reasons, I cannot order the assignees of the bankrupt's estate to pay the trustees of the Dartford Savings Bank any part of their demand.

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The deep importance which must always attach to societies established for the safe custody and increase of small savings, belonging to the industrious classes of the country, and the many instances which, unhappily, have lately occurred of defalcations by the officers of savings banks, and other like institutions, have induced me to give a more lengthened judgment in this case than I should otherwise have thought necessary ; and there is still one further point which I feel bound to mention ; but as it was not raised before me by the assignees, I do not at present do more than shortly advert to it. If, in the course of the inquiry in this case it appear, that the sum which the trustees of the savings bank say is due to them for the money received by one of the officers, by virtue of his office, is in effect money which such officer has feloniously embezzled, it becomes a serious question whether the trustees or the bank can seek civil redress before the matter has been heard and disposed of before the proper criminal tribunal, in order that the justice of the country may be first satisfied in respect of the public offence. I am aware that in *Ex parte Jones*, 2 M. & A. 204, Sir John Cross seemed to think that the relation of master and servant did not exist between the trustees of a savings bank and their actuary or cashier ; his Honour considered the actuary or cashier to be a public officer ; but Mr. Justice Erskine (the Chief Judge) does not intimate a like opinion ; and in *Rex v. Jenson*, 1 Mood. C.C., the prisoner, who was clerk to a savings bank, was indicted for embezzlement under the 7 & 8 Geo. 4, c. 29, s. 47, and it was held that he was properly described as clerk to the trustees, though elected by the managers, and that the conviction was good ; and in *Miller's case*, 2 Mood. C.C. 249, the prisoner, a clerk of a friendly society, was held to be the clerk or servant of trustees, within the Act. So also in *Hill's case*, 1 Mood. C.C. 274, a member and secretary of a society was held properly described as the clerk and servant of the trustees. As to the principle of not allowing a civil remedy before a prosecution for the felony, and in what cases it is applicable,

I refer to the cases of *Crosby v. Long*, 12 East, 409 ; *Stone v. Marsh*, 6 B. & Cr. ; *Ex parte Bolland, re Marsh*, Mont. & Mac. 397 ; and *Ex parte Jones*, 2 Mont. & Ayr. 193 ; and in considering whether the deficiency of money which ought to be forthcoming amounts to embezzlement by the bankrupt, within the 7 & 8 Geo. 4, c. 29, s. 471, the following cases may be important:—*Rex v. Hall*, R. & R. 463 ; *Rex v. Grove*, 1 Mood. C.C. 447 ; *Reg. v. White*, 2 Mood. C.C. 91 ; *Rex v. Jenson*, 1 Mood. C.C. 434 ; and *Reg. v. Miller*, 2 Mood. C.C. 249.

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(Before Mr. Commissioner EVANS.)

Re BLACKWELL.

Wednesday,
June 19th.

THE bankrupt was a member of a learned profession. Some time previous to the petition, he purchased the lease of a coffee-house and premises, and resided and carried on the trade as a coffee-house-keeper on the premises, together with a person called Lea, whose name the bankrupt assumed. Goods were ordered by the bankrupt in the name of Lea, some of which were delivered at a house in which he exercised his profession, and thence forwarded to the house where he traded as a coffee-house-keeper. The petitioning creditors afterwards became aware that the name of Lea was assumed by the bankrupt, and that his real name was Blackwell ; the customers at the coffee-house were also aware of the bankrupt's real name, and were in the habit of addressing him as Mr. Blackwell.

The bankrupt, having become involved, sold the lease and good-will of the coffee-house, and handed the purchase-money over to a friend, whom he requested to apply such money in payment of his (the bankrupt's) debts. The sum so to be applied was insufficient, and the bankrupt then requested his friend to offer to his creditors a composition, which was done in the bankrupt's real name.

Disputed adjudication ; trading in false name ; act of bankruptcy remaining in prison. Semble, that where a person carries on a trade in an assumed name, and the creditors became aware of the person's real name, it is sufficient that the real name is used in a petition for adjudication in bankruptcy against such person. Every twenty-one days during which a trader debtor remains in prison, constitutes a fresh act of bankruptcy.

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The bankrupt was arrested by a creditor, and remained in prison for some time. The twenty-one days (sec. 69) elapsed more than twelve months before the filing of the petition, but the bankrupt remained in prison for several periods of twenty-one days within the twelve months ; this was the alleged act of bankruptcy.

Lucas, counsel, for the petitioning creditors.

Sargood, counsel, for the bankrupt.—The adjudication ought to be against Blackwell, as trading under the name of Lea ; the petition is, therefore, insufficient, as the name of Blackwell only is therein mentioned. The act of bankruptcy is insufficient, the twenty-one days elapsed more than twelve months (sec. 88) previous to the filing of the petition ; subsequent remaining in prison will not revive an act of bankruptcy by remaining in prison, which was originally void.

Mr. Commissioner EVANS.—Every separate period of twenty-one days remaining in prison is a separate act of bankruptcy. The adjudication must be confirmed.

(Before Mr Commissioner FONBLANQUE.)

Wednesday,
June 26th.

Re TIDMARSH.

Adjourned certificate ; notice of opposition ; Practice.

Where the certificate is adjourned, no new notice of opposition will be received.

Otherwise, where the certificate has

been adjourned *sine die*, with leave for the bankrupt to apply again on certain conditions.

THIS was an adjourned certificate sitting. The question arose as to whether creditors who had not opposed at the original sitting could now be heard in opposition.

Mr. Commissioner FONBLANQUE.—When the certificate has been adjourned, the original and adjourned sitting must be considered as one ; therefore, I cannot hear the new opposition.

The certificate was again adjourned *sine die*, with leave for the bankrupt to come up on the performance by him of certain conditions.

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Re
TIDMARSH.

Mr. Commissioner FONBLANQUE.—Where such an adjournment *sine die* has been ordered, any creditor will be at liberty to oppose the bankrupt when he comes up again, upon giving proper notice. (a)

(Before Mr. Commissioner HOLROYD.)

Ex parte BOUCER, *re* BOUCER.

Friday,
June 28th.

THIS matter came before the Court on the petition of the bankrupt, stating that the petitioner was adjudicated a bankrupt in the month of May, 1848; that at a public meeting for the proof of debts, one Ambridge, on behalf of himself and another, proved a debt against the bankrupt's estate to the amount of 37*l.* 10*s.* 8*d.*; that, notwithstanding such proof, Ambridge sued the bankrupt in her Majesty's Court of Queen's Bench for the same sum of 37*l.* 10*s.* 8*d.*, and was proceeding to judgment and execution. The prayer was, that Ambridge might be restrained from proceeding at law, and in case the action should be proceeded with, that the said proof might be expunged, and for further relief. That part of the prayer as to expunging the proof was abandoned on behalf of the bankrupt.

Injunction.

Where a creditor, who has proved his debt, subsequently sues the bankrupt for the same debt,—

Quære—whether the Court has power to grant an injunction to restrain the plaintiff from proceeding at law.

Lawrance, solicitor, cited *Ex parte Moore*, Buck; *Ex parte Sly*, 2 Gl. & J. 163; *Ex parte Schlesinger*, 2 Gl. & J. 392; *Ex parte Flower*, 16 L. J., N. S. Bankruptcy, 9; *Ex parte Watson*, 1 Atk. 152; *Ex parte Haynes*, 107; *Ex parte Capot*, 1 Atk. 218; *Ex parte Diack*, 2 M. & A. 675.

(a) But see *Ex parte Woods*, Lord Chancellor, 2nd May, 1851.

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& L. P. C. 142.

—
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Mr. Commissioner HOLROYD.—It is contended that, under the statute, sec. 182, proof is election and waiver of all legal or equitable remedy in respect to the debt proved ; but as to the question whether or not I have jurisdiction to restrain, it has been contended that, under the statute, I have now as full jurisdiction as the Vice-Chancellor in bankruptcy, or as formerly the Lord Chancellor had in matters relating to bankruptcy. The Lord Chancellor's jurisdiction in bankruptcy has always been a matter of uncertainty, so far as it is not expressed in the statutes relating to bankrupts. It has been held, that the Lord Chancellor had power to make any order or decree which would be necessary to give effect to those statutes ; and upon that I think the peculiar jurisdiction of the Lord Chancellor in bankruptcy is founded. But my jurisdiction rests upon the statute, and I think is limited by the words expressed in sec. 12. Under that section, the Court might make such an order as is now prayed for against the assignees or persons submitting, but it is very doubtful whether in such a case as the present the Court has jurisdiction to grant an injunction to restrain proceedings at law. There will be, however, no failure of justice if I decide against the jurisdiction of this Court, since the Court of Queen's Bench has power to protect the bankrupt by staying the proceedings, as in *Woodward v. Meredith*, and *Harley v. Greenwood*, 5 B. & A. 95. I think, therefore, that there is no occasion for the interference of this Court.

Petition dismissed.

1850.

(Before Mr. Commissioner WEST.)

Ex parte SHAW, *re* MARTIN CAWOOD.Friday,
July 5th.

JOHN CAWOOD, the father of the bankrupt, by his will devised to the bankrupt certain real estates. He then gave to five grand-children "the legacy or sum of 1,000*l.* each; all which said legacies I hereby direct shall be paid to my said grand-children respectively, as and when they shall respectively attain the age of twenty-one years, and shall bear interest in the mean time from the day of my decease, after the rate of 4*l.* per cent. per annum, to be paid half-yearly." The will contained a proviso that in case of the death of any of the grand-children under twenty-one, the principal of their legacies should not be raised or paid, and then proceeded: "I hereby will and direct that my said son Martin Cawood (who was appointed executor) shall, within six calendar months next after my decease, execute and deliver unto the said John Hope Shaw, his heirs, executors, or administrators, five separate bonds or obligations in writing, each for receiving the principal sum of 1,000*l.*, with interest thereon from the time of my decease, such principal sum respectively to be made payable on the respective days and times when my said grand-children will (if living) respectively attain the age of twenty-one years, and the interest thereof respectively to be calculated from the time of my decease, and to be payable by two equal half-yearly payments." In case Martin Cawood should *refuse* to give the bonds, provisions were made for securing the legacies; and then the testator directed that if any of the grand-children should die under twenty-one, "the bonds or bond which shall have been given by my said son Martin Cawood, for securing the legacy or legacies of such grand-child or grand-children, so dying as last aforesaid, shall be delivered up to my said son, on payment by him of all interest thereon, up to the time of the decease of such grand-child or grand-children respectively, in order that the same may be cancelled."

Bond; Forfeiture; Contingency; Proof.

A. gave to B. a bond, conditioned for payment of 1,000*l.* when C. an infant (if living) should attain twenty-one, with interest in the mean time payable half-yearly. A. became bankrupt during the minority of C. At the date of the fiat, there was an arrear of interest due on the bond:

Held, that the bond was forfeited; that the debt was not contingent, within 12 & 13 Vict. c. 106, s. 177; and that B. was entitled to prove against the estate of A. for the whole 1,000*l.*, with interest to the date of the fiat.

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The testator died on the 6th of January, 1846, and on the 6th of July, 1846, Martin Cawood executed and delivered to Mr. Shaw the five bonds, in the terms of the will.

On the 28th of March, 1848, Martin Cawood became bankrupt. At that time there was an arrear of interest due on each of the bonds. The five grand-children are still living, and are all still infants.

Bond (on a former day), on behalf of Mr. Shaw, applied to prove for 5,000*l.* on the five bonds, with interest to the date of the fiat. The question will be, whether Mr. Shaw is entitled to prove for the whole, as there is a contingency to be valued under sec. 177 of the new Bankruptcy Act. It is submitted that the debt was absolute at the date of the fiat, because the bonds were forfeited for non-payment of the interest (*Skinner's Company v. Jones*, 3 Bing. N.C. 481); and equity will in such cases arrange the proof on the footing of the debt at law. (*Ex parte Winchester*, 1 Atkyns, 118; *Ex parte Rowland*, 2 Rose, 416.) The 177th section of the new statute corresponds with 6 Geo. 4, c. 16, s. 56, which was the first enactment making a contingent debt proveable at all. Before that Act, the simple question was, whether the debt was contingent or not; if not, it could not be proved. The cases cited show that this debt was proveable before the 6 Geo. 4 passed; therefore it is not contingent. The statutes by which contingent debts were made proveable do not restrict previous rights. As Mr. Shaw does not require their aid, he is not bound by their conditions, and there is nothing to value under them; he is consequently entitled to prove for the whole 5,000*l.* and interest. *Ex parte Tindale*, 8 Bing. 402, may be cited on the other side. That case is an exposition of the statutes, but the reasoning at pp. 406-7 is really in favour of this application.

Dibb, for the assignees.—This is a contingency; for the grand-children may never attain twenty-one; and sec. 177

applies. It is true that the penalty of the bonds was incurred, but it could not be proved. At the date of the fiat, only one breach could have been assigned, viz. the non-payment of interest, and the judgment could only stand as a security for the interest as it became payable. (8 & 9 Wm. 3, c. 11, s. 8.) In *Ex parte Tindale* the court allowed the whole sum to be proved, only on account of the complicated nature of the interest. The right to prove is not disputed, but the debt must be valued; and it is stated that it should be so, for otherwise the dividend on the proof will have to be invested, and must come back to the bankrupt's estate in case of the death of any of the grand-children under twenty-one.

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Bond, in reply.—The *Skinners' Company v. Jones* expressly decides that the whole debt is proveable. The other cases cited were decided after the passing of 8 & 9 Wm. 3, which does not apply. This is a vested interest, subject to be divested on a certain event and on a certain condition.

Mr. Commissioner WEST now pronounced his decision.—*Ex parte Winchester* is the only case strictly applicable, and it decided that, on the bonds alone, the whole debt was proveable. How does the will (if it can be imported into the case) make any difference? Interest was given on the legacies, which clearly became vested. The bonds were to be given by Martin Cawood, and, if he refused, the money was to be raised; and in case of the death of any of the grand-children, it was to be returned. This confirmed the view that the legacies were vested, subject, indeed, to be divested on a certain event. In his opinion, Mr. Shaw was entitled to prove for the whole amount, subject to any question as to the dividends on the principal being invested so as to be secured in case of the death of any of the legatees under twenty-one. The payment of the dividend on the 5,000*l.* must be suspended for a month, to enable the assignees to make any application for this purpose that may be advised.

1850.

*Wednesday,
July 31st.*

(Before Mr. Commissioner GOULBURN.)

ANONYMOUS.

Summons to
trader debtor :
Bankrupt Law
Consolidation
Act, 1849.

It is suffi-
cient to follow
the form of
particulars of
demand and
notice requir-
ing payment
given in sche-
dule G to the
Bankrupt Law
Consolidation
Act, 1849.

The Rules of
the 12th of
November,
1842, are by
the General
Order of the
12th of Octo-
ber, 1849,
made appli-
cable to the
forms of pro-
ceedings
"where not
provided for"
by the Bank-
rupt Law Con-
solidation Act,
1849. Schedule
G provides
the forms of
particulars of
demand and
notice requir-
ing payment.

IN this case the creditor had adopted verbatim the form given in schedule G to the Bankrupt Law Consolidation Act, 1849, in the particulars of demand and notice requiring payment served by him upon the debtor.

The debtor's solicitor objected to the particulars and notice as being insufficient, on the ground that the creditor had signed his name only, without adding the words "residing at _____, in the county of _____, or carrying on business at _____, in the county of _____," as required by the 20th Rule of the 12th of November, 1842.

The creditor stated that the form in the Act had been strictly followed, and the description and address of the creditor appeared at the commencement of the form.

Mr. Commissioner GOULBURN (after comparing the creditor's particulars of demand and notice with the form given in the Bankrupt Law Consolidation Act, 1849, and reading the General Order of the 12th of October, 1849) stated that he had before decided the same point. The old bankrupt law had been repealed by the Consolidation Act, and the General Order of the 12th of October, 1849, extended the rules in existence at the passing of the Act to the forms of proceedings "where not provided for" in the Consolidation Act. A form is provided for the present purpose, and it has been strictly followed, and that is sufficient. It cannot mislead the debtor.

The creditor stated that the summons was returnable on a previous day; but the debtor's solicitor then objected that the creditor was not present, and it was for that reason adjourned until to-day. In the mean time the debtor had taxed the creditor's bill of costs (being the debt forming the particulars of demand) under a judge's order, which directed payment in

a week, or execution might issue ; and the creditor stated that the debtor had thus given security to his satisfaction, and he was willing that the summons should be dismissed.

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ANONYMOUS.

Mr. Commissioner GOULBURN.—I shall dismiss the summons without costs. The debtor, on the first day, objects that the creditor is not here, and wishes the summons adjourned, and, now the creditor is here, he has nothing to say to him. I shall give no costs. The security of the judge's order, however, is another kind of security from that contemplated by the 80th section of the Act, and I shall merely indorse on the summons "summons dismissed without costs."

(Before Mr. Serjeant STEPHEN.)

Re MARIA ROBERTS.

Friday,
September 20th.

HIS HONOUR delivered judgment in the following terms.—When this case came before me on the 17th, I inclined to allow the objection taken on behalf of the petitioning creditor ; but I thought it better to defer my judgment, and further consideration has altered my view of the matter. The objection, in substance, is this—That, by the 104th section of the Act of Parliament, seven days, or an extended time not exceeding fourteen days in the whole, are allowed for showing cause against an adjudication ; and if within such time the person adjudged bankrupt shall show, to the satisfaction of the Court, the invalidity of the adjudication, the same shall be

Practice ; construction of sec. 104 ; disputed adjudication.

By sec. 104 of the Bankruptcy Consolidation Act, seven days, or an extended period of not more than fourteen days in the whole, are allowed for showing cause against an adjudication ; and if within

such time the bankrupt shall show, to the satisfaction of the Court, the invalidity of the adjudication, the same shall be annulled :

Held, that the meaning of this provision is, that if the party shall, within the appointed number of days, have brought the case before the Court, and done what was in his power to obtain a hearing, the Court shall entertain it, and if satisfied, ultimately, of the invalidity of the adjudication, shall thereupon annul it, although circumstances, not arising from the default of the party, should have occurred to prevent the Court from actually giving judgment, or even beginning to hear the case, within the period prescribed by the statute.

The provisions of the statute are satisfied if the party, within fourteen days, appears and presents himself to the Court, and is ready to show cause, and is only prevented by an accident not under his control.

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Re
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annulled; which implies (as is contended) that unless the insufficiency is shown within the fourteen days, it is afterwards too late for the Court to annul. And, as regards the present case, it is insisted that the fourteen days expired on the 5th September, and that it has not yet been shown to the Court that the adjudication is insufficient, and that no announcement even has been made of showing this to the Court; for although, on the 3rd of September, evidence against the adjudication was taken before the Registrar, this is no showing cause within the Act of Parliament, the Registrar being excluded by the 27th section from the power to hear a disputed adjudication, and all showing of cause before him being, consequently, null and void; so that the result is (as contended) that it is now too late for the Court to annul the present adjudication. But, after carefully examining the provision in question, and reflecting on its real nature and object, I am of opinion that this is one of those cases in which, by adhering servilely to the words of an Act, we should depart from its meaning. Already it has been decided in this court, and, I believe, by other commissioners, that the provision in question does not require cause to be fully shown against the adjudication within the fourteen days; and that it is sufficient that the party begins to show cause within the fourteen days, although the case is then adjourned, and is not, in fact, concluded till long after the fourteen days have expired. And this construction (which has not, I think, been questioned) must be supposed consonant with the intention of the Legislature; for the greatest inconvenience would ensue if, in a case involving much evidence, a discussion is interrupted by illness of parties, or the like, it should be absolutely necessary to bring the proceedings to a close, and even to obtain the Court's judgment, within a short period of this discussion. And, on the other hand, no reason of public policy can be shown for prescribing under such cases so inflexible a limit. But, if so, it follows that the words of the provision are not to be literally understood, but admit of a certain latitude of interpretation;

and it seems to me, upon the same principle, we may and ought to advance a step still further in the same course of liberal construction, and to hold the Act satisfied if the party, within fourteen days, appears, and presents himself to the Court, and is ready to show cause, and is only prevented by an accident not under his control, such as the illness of the commissioner. And such, I think, is the fair effect of what took place on the 3rd September ; and it ought, in my opinion, to be so entered on the file ; for the person adjudged bankrupt then came, by her solicitor, before the Court (that is to say, before Mr. Serjeant Ludlow, and not before the Registrar, for the Registrar can act only as deputy to the Commissioner, and in the event of the Commissioner's absence), and was ready with her witnesses ; and her solicitor must be understood to have presented himself for showing cause in court, had the Commissioner happened to be there. Nor does it make any difference that, in fact, the parties did not expect the Commissioner to be able to attend, and had agreed that the case should be adjourned over to the 17th ; for still, if the Commissioner had unexpectedly appeared, the actual showing of cause might have taken place, and would presumedly have been begun, *pro formâ* at least, so as to introduce the prior adjournment agreed upon as an adjournment made by order of the Commissioner. The effect of the decision is, that I consider the provision, that the party shall be allowed so many days to show cause, and that the adjudication shall be annulled, if within such time he shows its invalidity to the satisfaction of the Court, as equivalent only to a provision that, if the party shall, within the number of days, have brought the case before the Court, and done what was in his power to obtain a hearing, the Court shall entertain it, and if satisfied, ultimately, of the invalidity of the adjudication, shall annul it, though circumstances, not imputable to the party, should have occurred to prevent the Court from actually giving judgment, or even actually beginning to hear the case within that period of time. And it will be found, I think, that there is sufficient

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authority in the books “for taking so much liberty as this with the words of an Act of Parliament (even an Act of modern date), in order to let in that meaning to which reason and manifest convenience are found to point.” I may add that I think there is no reason to question the validity of the adjournment that took place on the 3rd of September; for although the Registrar has no authority to hear, he has authority, for anything I see, to act contrary, to adjourn a hearing; but, on the other hand, unless cause can be shown to the contrary, I shall hold that no use can be made of the examinations taken before the Registrar, which appear to me to have been in the nature of a hearing, but a hearing *coram non judice*. Indeed, the learned officer himself seems to have considered their regularity doubtful, as he took them provisionally only, and with express reference to the possibility that the Commissioner might order the witnesses to attend again.

Stone then suggested that the case should be adjourned till such time as might now be agreed upon.

His HONOUR concurred, and intimated that it would throw more light on the case, if the Registrar supported the view he (the learned Commissioner) had taken of the case, as to the examinations being taken *de novo*, that an entry should be made on the file, that, on the 3rd of September, Mr. Kearns, as solicitor to the alleged bankrupt, appeared to show cause against the adjudication, with his witnesses, Mr. Miller being also present, on the part of the agent of the petitioning creditor, when, in consequence of the Commissioner not being able to attend, it was agreed that an adjournment should take place.

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(Before Mr. Commissioner GOULBURN.)

Ex parte CLUTTON AND ANOTHER, *re* NASH AND NEALE.*Saturday*
December 7th.

THE petition stated, that on Saturday, the 22nd day of June, 1850, the petitioners delivered to Thomas Bowring, as the agent of the petitioners, a sum of 1,179*l.* 5*s.* 3*d.*, consisting partly of notes of the Bank of England and country notes, partly of cheques on country bankers, and partly of gold, silver, and copper, with directions to lodge the money at the bank of Messrs. Nash and Neale, to the account of the petitioners. That at eight o'clock in the evening of the 22nd day of June, Thomas Bowring took the money to the banking-house of Messrs. Nash and Neale, but that the bank had been closed since five o'clock in the afternoon, and therefore the money could not be deposited in the bank, or any entry made thereof in the bank books. That Thomas Bowring thereupon went to the private door of the banking-house, and inquired for Thomas Johnson, the manager of the bank, and who resided in the house; and that Thomas Bowring was informed that Thomas Johnson was not at home, but that he should be sent for; and thereupon Thomas Bowring entered the house, and shortly afterwards Thomas Johnson returned home. That Thomas Bowring then placed the bank-notes, cheques, and cash in the hands of Thomas Johnson, who counted them and made a list thereof, and signed and delivered to Thomas Bowring a receipt for the same, dated as of the following Monday, 24th of June, 1850. That the bank-notes, cheques, and cash were not entered by Thomas Johnson in any of the bank books, or in any way mixed with the bank moneys, but were placed by him separate and apart in a bag containing the bank-notes, cheques, and cash only. That the bank was usually opened at nine o'clock in the morning, but that on Monday, the 24th of June, 1850, the bank was not opened; but that before nine o'clock of the

Money was paid into a bank, through the clerk of the bank, on Saturday evening after office hours. On the same evening one of the partners of the bank made a declaration of insolvency, in the absence and without the knowledge of his partner. The bank never again opened for business, and the other partner concurred in allowing it to remain closed. Both partners were subsequently adjudicated bankrupts:

Held, that the money so deposited passed to the assignees.

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re
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morning of that day a notice was affixed to the door of the banking-house, purporting to inform the public that the bank would not again be opened. That on Monday, the 24th of June, the petitioner, Robert Clutton, having been informed, as the fact was, that from the time of Thomas Bowring leaving the money at the banking-house the bank had not been opened, and that the money so left at the banking-house had not been received by the bankers, applied to Thomas Johnson to return to him the bank-notes, cheques, and cash, as being the property of your petitioners, but that Thomas Johnson declined so to do without the direction of the bankers; and that Mr. Kelly, the solicitor of Joseph Nash, who was present at the interview, informed your petitioner, Robert Clutton, that the bank-notes, cheques, and drafts could not be returned at present, but that they would be in safe custody, and that he, Mr. Kelly, had earmarked the bag in which the same were contained. That the bankers, by closing the bank on Monday, the 24th day of June, 1850, committed an act of bankruptcy, and thereby became bankrupts; and that on the 27th day of the same month they were adjudged bankrupts, and William Pennell, Esq., was appointed the official assignee of their estate and effects; and that William Pennell took possession of the effects of the bankers, and also wrongfully took possession of the bag containing the bank-notes, cheques, and cash belonging to the petitioners. That the cheques contained in the bag amounted together to the sum of 820*l.* 14*s.*; and that two of the cheques, amounting together to the sum of 60*l.* 12*s.* 7*d.*, were on the bank of Messrs. Nash and Neale, but that the rest of the cheques, amounting to the sum of 760*l.* 1*s.* 5*d.*, were drawn on various other country banks; and that the notes drawn on country banks, contained in the bag, amounted to the sum of 100*l.*; and that part of such notes, to the amount of 40*l.*, were notes of Messrs. Nash and Neale, and the residue of the notes, amounting to the sum of 60*l.*, were the notes of other country banks. That William Pennell, the official assignee, in order

to provide against any loss by the failure of the country banks, immediately procured the cheques, except those drawn on Messrs. Nash and Neale, and also the notes on country banks, excepting those of Messrs. Nash and Neale, to be cashed and received; and has now in his hands the proceeds arising from the cheques and notes, which amount, after deducting a commission of 1*l.* 7*s.* 6*d.*, to 81*l.* 13*s.* 11*d.* That the official assignee has also now in his hands the cheques on the bank of Messrs. Nash and Neale, amounting to 60*l.* 12*s.* 7*d.*, and the notes of Messrs. Nash and Neale, amounting to 40*l.*, the Bank of England notes to the amount of 90*l.*, and the gold, silver, and copper, to the amount of 168*l.* 11*s.* 3*d.* It was in evidence that both the bankrupts were very aged men, and unable to attend constantly to the business of the bank, and that the whole management of the business was intrusted to Johnson, who was in the habit of receiving deposits after office-hours, to accommodate customers; that the Messrs. Clutton were in the habit of making deposits after the bank had closed. Johnson, when examined, swore that at the time of the deposit in question he was acting as manager of the bank, and that he had no specific instructions as to this transaction, but acted according to his discretion and usual custom; that the receipt he gave was in the usual form, but was dated as of Monday, and not Saturday, and was for cash, which would have gone immediately to the credit of the petitioners; that he was not aware that Nash had made the declaration, or contemplated bankruptcy, and that he did not think it probable that the bank would close on the following Monday.

Lewin, in support of the petition.—The receipt of the deposit by the bankrupts through their agent, at a time when bankruptcy was not only inevitable, but actually contemplated and determined on by one of the firm, amounts to a legal fraud,—a circumstance which will take the case out of the general rule in bankruptcy. (*Sadler v. Belcher*, 2 Moo. & Rob. 489, and *Threlwal v. Giles*, there cited.) Here money was deli-

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vered under a mistake as to the solvency of the person receiving it, and it might have been recovered from the bankrupt but for the bankruptcy; but the bankruptcy does not take away the rights of the depositors; the assignees are only in the same position as to them as the bankrupts were. The deposit with Johnson was irregular, and was not a payment into the bank *quâ* bank. The receipt by Johnson only amounts to an agency; and if he were our agent, the receipt from him by the bankrupts would be a fraud; but he was, in fact, an agent for both parties; like an auctioneer who has received a deposit in respect of a sale, he is the agent for the vendor or the vendee, according as to whether the contract is completed or not; and in this case the agency will be determined by the result, viz., whether the bank would open again for business or not; for the opening of the bank so as to enable the depositor to draw, is the consideration on which the contract between the banker and customer is founded (*Ex parte McGal*, 2 Rose, 376), which consideration has failed, and Johnson remains our agent; and considering him as such, the deposit made by him in the manner it was, was a specific deposit in trust, to be paid into the bank when the bank opened for business. This appears from the terms and date of the memorandum of receipt given by Johnson to the petitioners. Had the petitioners been aware of the facts, they might have exercised their right of stopping the money, which was *in transitu* from the time of the delivery on Saturday evening till such time on Monday as the banking-house would have opened. (*Ex parte Cunningham*, 3 Deac. & Ch. 58; *Ex parte Solomons*, ib. 77; and *Ex parte Sutherland*.) But if the money was received by Johnson as agent for the bank, it must be deemed a specific deposit, and not a loan, which would become part of the general assets and pass to the assignees. It appears by the memorandum, that the money was intended by both parties to be entered on the next occasion when the bank should re-open for business. No entry was ever made; so that the deposit still remains in trust for

the petitioners. (*Barthorpe v. Barthorpe*, 1 B. & Cr. 5 ; *Toovey v. Milne*, 2 B. & Ald. 683.) The money was also tied up in a bag and earmarked, so that it comes under the rule as to deposit of plate or short bills, which cannot be disposed of by the bank, as money paid for the usual purposes. But if the cash passes to the assignees, the drafts do not,—they are not cash ; being named as such does not alter their nature. Bills so entered improperly have been returned to depositors on a bankruptcy. The drafts would only become cash, if intended by the depositor so to be treated. (*Giles v. Perkins*, 9 East, 12 ; *Thompson v. Giles*, 2 B. & Cr. 422.) Here they could not be treated as cash,—they were never intended as such. At the time of the deposit, the balance was in our favour, so that no lien can be set up against us.

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Bagley, counsel, for the official assignee.—There is no right of priority between persons who have made payments to a bankrupt previous to the bankruptcy, in respect of the time when such payments were made. In this case, the deposit, though made in a peculiar way, was placed with other moneys and securities belonging to the bank. The declaration of insolvency made by Nash was only conditional on Saturday night ; it was not a complete act of bankruptcy until it was filed on the following Monday ; nor could it affect Neale, who was absent, and was not aware of what had taken place ; so that there was no act of bankruptcy on his part till he had concurred in the closing of the shop on Monday. The question now is, do the facts take this case out of the general rule that payments made previous to bankruptcy pass to the assignees ? Here, to have repaid Messrs. Clutton would have been a fraudulent preference. It was relied on by the other side, 1st, that it was a payment on the eve of bankruptcy ; 2ndly, that it was after office-hours, and not entered ; and, 3rdly, that it was a specific deposit. As to the first point, bankruptcy is the line drawn by law as to the time when contracts may be made by a person who afterwards becomes

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bankrupt. Proximity of bankruptcy does not alter the law up to the moment of bankruptcy: till then, a trader may do anything he might have done at any time before. As to the payment being made out of office-hours, it has been shown that such a mode of payment was usual in the bank, and that the petitioners were in the habit of making deposits late in the evening to suit their own convenience, and that such deposits were treated by both parties as if they had been regularly made. The entry in books is only for the information of the bankers, and does not bind customers. Assume that a banker made no entries, would a customer be precluded from his remedy for dishonour of his cheques, &c.? Different banks keep their books in different ways: in the Bank of England, cheques paid one hour may be drawn for the next. Entries are for the purpose of tracing deposits. The rights of parties are not to be affected by the mode in which it is entered, but by the contract, which, in this case, is the common contract, between banker and customer, which only constitutes a loan, with the provision that the banker must honour cheques. The modern authorities support this view. (*Pott v. Clegg*, 16 M. & W. 321.) The customer's deposit is a debt which may be barred by the Statute of Limitations; which would not be so if it were a trust. The receipt was in the regular form. The words, *to be accounted for on demand, and for Joseph Nash and Thomas Neale*, preceding the signature, are engraved; so that the deposit might be drawn for immediately. Is this an agency by Johnson, as suggested? If so, the remedy ought to have been against Johnson; there would be no privity on the part of the assignees. The question is, if the bankers received the deposit, and placed it in the till, or applied it to their own use, would they be liable for an action? Would they be in the same position as if they had so applied a specific chattel? To support such an argument, it should be shown that bankers may not use money deposited with them, or use it in the common way for their profit. Were the bankrupts parties before Monday morning?

The receipt was dated for Monday, because the books had been put aside, the hours of business having expired, the entry could not have been made sooner than Monday. If the receipt had been dated on Saturday evening, and an entry made afterwards, it would have caused confusion. As to the question of interest not running till Monday, the money could not be used in business before ; and if there had been a contract for interest, it would have been agreed that the interest would only run from the time when the money could have been applied to business purposes ; but that question does not occur now. The petitioners demanded the money from the agent of the bank *after* it had arrived at its destination ; so there can be no stoppage *in transitu*. *Sadler v. Belcher* was at Nisi Prius, and was never carried further, and was decided on the ground of fraud. There the partners had resolved to stop before the deposit was received,—the act of bankruptcy had commenced ; but here, though Nash had determined to commit an act of bankruptcy, that did not affect Neale. This is a case of a firm of which we are assignees, and not of Nash alone. It cannot be said that the act of bankruptcy of one could have operated against Neale. The cases cited on the other side establish no principle as to the validity of contracts up to the date of the bankruptcy. In *Ex parte Cunningham*, the contract was subsequent to the act of bankruptcy. This is not a specific deposit, and therefore demandable from the assignees under the principle relied on by the other side ;—there has been no evidence to support their view. The receipt of the deposit by Johnson was in conformity with the general custom of the bank ; nothing passed on this occasion different from what had passed on previous similar occasions. This is not a contract founded on the power to draw,—but this is simply a loan, and the right to draw is a conventional arrangement as to the mode of payment. Cheques are usually considered as cash, though it is otherwise as to bills not due. Here the cheques would have been entered on the debit side, and so treated as cash. (*Ex parte Sargent*, 1 Rose, 153.)

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Whether short bills are deposited for a specific purpose, or as cash, depends on the understanding between the parties at the time of deposit; and, once treated as cash by drawing for the amount, they cannot be treated as anything else. (*Ex parte Pease*, 1 Rose, 238.) Here there was a power to draw for the whole; so that the distinction between the cash part of the deposit and the drafts must fail. *Thompson v. Giles*, and *Giles v. Perkins*, support this view.

Lewin, in reply.

JUDGMENT.

In this case it has been shown to me that Nash had, on the night in question, determined, in a certain event, to commit an act of bankruptcy; but that determination was unknown to Neale, who, it appears, actually resisted any proposition as to bankruptcy until he found the house closed on the Monday morning. The act of bankruptcy against him was permitting the house to remain closed; and, under the circumstances, it cannot be said that such an act can have any relation to the conversation which took place on Saturday evening in his absence. Moreover, the declaration of insolvency was not a complete act of bankruptcy till filed, and that did not take place till the Monday; so that it cannot be established that the firm became bankrupt till the latter day, although one of the partners resolved on bankruptcy previously; for such a determination by one partner will not bind the firm. In *Sadler v. Belcher*, and the case there cited, it had been agreed on by all the partners that the bank should not be re-opened. Assuming this deposit to be cash, it would pass to the assignees; and it appears by the receipt, as well as by the custom of dealing between the parties, that this deposit was intended to be taken to be cash to be accounted for on demand; and this takes the case out of the doctrine in *Whitmore v. Wells*; for there no receipt was given. It is true no entry was made in the bank books; but that is to be accounted for by the lateness of the hour, and the books having been closed for that

day. To have made an entry after the books were balanced, would have created confusion. I do not think that any agency on the part of Johnson for the petitioners has been established. He acted only as he had been in the habit of doing on other occasions for the convenience of the petitioners, on which occasions the deposits were considered as made in the regular way, and became immediately part of the funds belonging to the bank. In *Threlcal v. Giles*, the manager was aware that the bank was about to stop. In *Ex parte Cunningham*, the deposits were made at a branch bank, subsequent to the stoppage of the principal bank; so that this case differs from both those cases. That there is any contract founded on the receipt being post-dated, would be an inference not supported by the circumstances; and I think no fraud has been made out; so that the case resolves itself into this,—that the deposit was paid to and received by the manager of the bank in the usual course of business previous to the bankruptcy, and becomes assets of the bank, and as such may be proved for, but cannot be recovered.

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Ex parte
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Petition dismissed. (a)

(Before Mr. Commissioner FONBLANQUE.)

Re ———

Wednesday,
Nov. 20th.

A BILL of exchange was drawn by A., accepted by B., and indorsed, among others, by C., and ultimately came into the hands of D. The bill was dishonoured at maturity, and duly protested; but D. failed to give any notice of dishonour to C.,

A holder of a dishonoured bill of exchange cannot establish a petitioning creditor's debt against an indorser who has had no notice of dishonour through the laches of the holder.

(a) There was an appeal from this decision to Vice-Chancellor Knight Bruce, who directed a trial at law; but the matter was arranged between the parties, and no trial took place.

Where the act of bankruptcy was failing to enter into a bond to secure petitioner's debt, and the debt is insufficient, the act of bankruptcy is also insufficient.

1850. and a considerable period elapsed between the dishonour of the bill and the present time.

Re —

A petition for adjudication in bankruptcy was filed against C., founded on his failing to find securities under sec. 80, but the petitioning creditor failed to establish his debt. D. now sought to set up a substituted petitioning creditor's debt against C. under sec. 76.

Bagley, counsel, for petitioning creditor.—We rely on the original consideration.

Laurance, solicitor, *contrà*, cited *Alderson v. Langdale*, 3 Barn. & Adol.

Mr. Commissioner FONBLANQUE.—Where there has been laches by the holder in failing to give notice of dishonour to indorsers of a bill of exchange, it has been held that the holder cannot revert to the original consideration against the indorser ; and the indorser has been discharged from his liability. This is the present case. Adjudication must be annulled.

Laurance, solicitor, asked that the memorandum on the proceedings should also state that the act of bankruptcy was insufficient.

The COMMISSIONER.—It is rather late to make this application ; it should have been made as soon as the original petitioning creditor's debt failed ; for the act of bankruptcy (the not executing a bond to the party summoning as a creditor) failed as soon as it was established that there was no debt.

The memorandum was inserted.

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Re PIGGOT.

THE bankrupt had absconded.

This was an application for an allowance for the maintenance of the bankrupt's family.

Friday,
November 1st.
Allowance to
bankrupt's
family.

Mr. Commissioner FONBLANQUE.—Where the bankrupt has absconded, the Court has no jurisdiction to make the order.

Ex parte GREY, re GREY.

THE bankrupt applied for his certificate.

Norton, solicitor, for creditors, opposed.

Wednesday,
November 6th.

Certificate.
Notice of op-
position neces-
sary.

Linklater, solicitor, for bankrupt. — The creditors have given no notice of their intention to oppose.

Norton.—There may be circumstances under which notice would not be required. In this case, there is an agreement between us and the assignees, which has not yet been carried into effect; we were induced to refrain from giving notice by the hopes that the agreement would have been completed; under such circumstances, we are entitled to be heard in opposition, notwithstanding that we have not given notice.

Mr. Commissioner FONBLANQUE.—The statute requires that the bankrupt should have notice of opposition to his certificate. If you had shown that you had been led to refrain from giving notice by fraud or misrepresentation on behalf of the bankrupt, I might have heard you: but his right, under the statute, to have notice, is not to be taken away by the acts of other people.

1850.

(Before Mr. Commissioner HOLROYD.)

November.

Ex parte WATSON, *re* WYAT AND THOMPSON.

Shifting proof from joint to separate estate after payment of dividends—Election.

A joint creditor of a firm who had proved his debt against the joint estate when in ignorance of the state of the accounts (they being the subject of a suit in equity) and having received dividends, was allowed to abandon his proof against the joint estate, and, upon repaying the dividends, to prove against the separate estate.

PREVIOUS to the fiat, the bankrupts were jointly and severally indebted to one Adams, in a sum on their joint and separate bond, and joint and separate bills of exchange. The separate estate of Thompson became the subject of a suit in Chancery, entitled *Wyat v. Fuller*, and was supposed to be incumbered to the full amount. Adams therefore made his proof against the joint estate, and subsequently received dividends thereunder. By a decree in the suit of *Wyat v. Fuller*, the charges supposed to exist on the estate of Wyatt were disallowed, and the estate now proves to be of considerable value. Adams, who has since died, appointed Watson his executor.

This was the petition of Watson, praying to be permitted to abandon his proof against the joint estate, and upon repayment by him of the dividends received, to be allowed to prove against the separate estate of Wyatt.

Daniels, for petitioner.—The debt was, in fact, the separate debt of Thompson. At the time of original proof we had no choice, being in ignorance of the state of affairs; the separate estate was then worth nothing, it has since become valuable. (*Re M'Kenzie*, 1 Buck. 7; *Ex parte Masson*, 1 Rose.) There has been no conclusive election, because it was impossible for us to exercise a free judgment and to foresee that the separate estate would become valuable under the then circumstances. Adams has already proved in respect of another debt, therefore he is not now barred by the certificate.

Stevens, for assignees.—Special circumstances must be adduced to show that election is not conclusive. There must be ignorance of law or material facts. There was here a proof against joint estate and receipt of dividends. There has been a lapse of twenty years since proof, and there has not been such

ignorance as would enable the Court to transfer the proof. The only creditor who could have shown this fact has died. Adams's signature of the certificate in respect of joint debts bars him, unless special circumstances be shown to the contrary. (*Ex parte Husband*, 2 Gl. & Jam. 4; *Ex parte Devenport*, 1 Mont. Dea. & De Gex.) Here the ground of the petition is, that the separate estate has turned out to be sufficient. But the creditor exercised his judgment once; subsequent accidents ought not to affect his election. Proof was made with full knowledge of the law of the then facts. The certificate has been signed, a final dividend declared, and a lapse of twenty years has taken place; the election was final.

Bagley, for a creditor, on same side.

Mr. Commissioner HOLROYD.—The question is, has there been a deliberate election? A man cannot be said to have made a deliberate election when he was ignorant of the state of the accounts. Here the accounts depended on the result of a Chancery suit of twenty years' standing; therefore I am of opinion that it cannot be said that Adams made a deliberate election. I think he has a right to reconsider his election, and that, upon giving up what he has received, and interest, he is at liberty to prove again.

Ex parte SMITH, re WYAT AND THOMPSON.

Nov. 13th.

PREVIOUS to the year 1829, the brothers Douglas Thompson and Henry Thompson carried on business as brewers, in partnership, and in January, 1829, the agreement on which

Proof of solvent partner, notwithstanding dissolution previous to bankruptcy.

On the dissolution of the partnership between H. T. and D. T., H. T. entered into a new partnership, and with his new partners was declared a bankrupt. D. T. subsequent to the bankruptcy, paid the debts of the old firm.

Held, that D. T. was entitled to prove for a moiety of the sums paid by him on account of the debts of the firm of H. T. and D. T. against the separate estate of H. T.

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was founded the partnership having expired, Henry Thompson agreed to sell his moiety in the business to Douglas Thompson for the sum of 15,000*l.*, part of which was then paid. At that time, the debts and credits of the firm of H. and D. Thompson were outstanding to a considerable amount ; Henry Thompson subsequently entered into a partnership with Wyatt, and Douglas Thompson entered into partnership with Wood and Fuller. The accounts of the partnership between the brothers Thompson being in dispute, were referred to Mr. Swanston, who made his award in November, 1831, by which the sum of 608*l.* was declared to be due to Douglas Thompson, and 5,299*l.* to Henry Thompson. At the time of the award, the debts due from the firm of the brothers Thompson outstanding amounted to about 10,000*l.* In December, 1831, Henry Thompson and Wyatt were declared bankrupts, and in December, 1832, by a decree of the Court of Chancery, in a suit for taking the accounts of the partnership of the brothers Thompson, a balance of account was found to be due to Douglas Thompson in respect of his having paid the debts of the partnership. By a decree of the Court of Chancery in the suits of *Wyat v. Fuller* and *Adams v. Thompson*, it was declared that there was due to Douglas Thompson out of the firm of the brothers Thompson, the sum of 4,419*l.* in respect of payments made by Douglas Thompson ; but as Douglas Thompson was bound to pay a moiety of the partnership debts, the amount so due is reduced to the sum of 2,209*l.* 18*s.* Smith, as the representative of Douglas Thompson, now sought to prove for that sum against the separate estate of Henry Thompson.

Bagley, in support of the proof.—Mr. Swanston's award only ascertained the partnership accounts up to the period when it was made. The present claim arises out of the payment of debts then outstanding. This is the ordinary case of a solvent partner proving against the separate estate of his bankrupt partner, in respect of debts paid subsequent to the bank-

ruptcy. (*Ex parte Watson*, Buck. 449 ; *Ex parte Hunter*, id. 552 ; *Ex parte Taylor*, 2 Rose, 175 ; *Ex parte Ogleby*, id. 177.)

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Stephens, contra.—The partnership having expired previous to the agreement of 1st July, the rights of the parties were then determined ; and Douglas Thompson could not after that claim a lien on the partnership assets. The rule in bankruptcy as to the right of proof by a solvent partner depends upon his having a lien. This is a case of a joint liability, and not of suretyship, as no debts were ascertained to be due at the time of the fiat. (*Ex parte Porter*, 2 Mont. & Ayr. 281.)

Mr. Commissioner HOLROYD.—The usual rule, that partners are sureties for each other, is not affected by *Ex parte Porter*. It does not seem that the rights of the parties were altered by the agreement of July. The proof must be admitted.

(Before Mr. Commissioner FONBLANQUE.)

Re ———

Nov. 20th.

SMITH, solicitor, applied for a summons to compel the attendance of a person who had been summoned to come before the Court on a previous day, but had failed so to do.

Practice.

On an application for a warrant to bring a person before the Court who had failed to obey a summons, the Court will not hear the solicitor or agent of the party against whom the application is made.

Linklater, solicitor, was about to show cause against the application.

Mr. Commissioner FONBLANQUE.—The party summoned cannot be heard by his solicitor or agent ; he is already in contempt. He might have sent a witness to prove that his absence was caused by such a necessity as the Court would admit to be a sufficient excuse for his non-attendance ; but, in the absence of such evidence, I can hear no argument against the application.

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(Before Mr. Commissioner HOLROYD.)

*Ex parte JARDINE, re JARDINE.**Monday,
December 23rd.*Breach of
trust ; refusal
of certificate :Misappropri-
ation of trust-
money on the
part of a bank-
rupt by using
it in his trade :Held, to be
such "conduct
as a trader" as
the Court may
consider on the
question of the
certificate.

THE facts will appear in the judgment.

Linklater, solicitor, for bankrupt.*Jones*, solicitor, for assignees.

JUDGMENT.

Mr. Commissioner HOLROYD.—This is an application by the bankrupt for his certificate. I deferred giving judgment, in order to make inquiry as to the particulars of a case of *Ex parte Wakefield* (not yet reported), decided by his Honour Vice-Chancellor Sir J. L. Knight Bruce, on an appeal from a decision of Mr. Commissioner Balguy. The gentleman who reports the cases in bankruptcy before the Vice-Chancellor informs me that the case of *Ex parte Wakefield* was decided solely upon the construction of the words "conduct as a trader," in the 198th section of the Bankrupt Law Consolidation Act (12 & 13 Vict. c. 106), and that the Vice-Chancellor held that the misappropriation of trust-money by the bankrupt, by using it in his own trading speculations, was not such conduct as the Legislature directed to be regarded by the words "conduct as a trader." The 256th section of the Bankrupt Law Consolidation Act was not brought under the consideration of the Vice-Chancellor in *Ex parte Wakefield*. The Court is required by that section of the Act to refuse or suspend the certificate, if it shall appear that the bankrupt has committed any of the offences therein enumerated : one of these offences (the third) is,—“if the bankrupt shall have contracted any of his debts by any manner of fraud.” The bankrupt (*Jardine*) is charged with having contracted a large amount of debt by fraud ; he is further charged with misconduct in having carried on trade and recklessly contracted debts after

a series of defalcations and offences which rendered him amenable to the criminal law. The money in respect of which the bankrupt was found to be a defaulter, or a large portion of it, was improperly used by him in his trade: if he had not resorted to those means, he must have stopped much sooner; and the prospect of his ability to repay the money taken by him depended upon his trade. The criminality of the bankrupt's conduct, then, in certain transactions of a pecuniary nature, cannot be denied; indeed, some debts originating in his misconduct have been proved, and one to a large amount claimed under the bankruptcy; but it is urged that such misconduct was not committed by the bankrupt in his trade, or as a trader, and that, upon the authority of the case of *Ex parte Wakefield*, which I have before mentioned, and a previous case of *Ex parte Spicer*, reported in the *Law Times* of November the 10th, 1849, and decided on the 5 & 6 Vict. c. 122, s. 39, such misconduct is not cognizable by the Court. Thus, I have to consider whether the bankrupt has committed any offence under the 256th section, and, as we have held that this enactment does not apply to offences committed before the 11th of October, 1849, from which day the Act was to commence and take effect, I must look to the time up to which the malpractices of the bankrupt extended; but I have also to determine a point of very great and extensive importance: whether the Court, in reviewing the conduct of the bankrupt as a trader, under the authority given by the 198th section, is confined to the consideration of conduct in the way of having contracted any particular class of debts. This must be determined by the language of the Bankrupt Law Consolidation Act, taking the whole Act together, and considering it with reference to the previous state of the law; and no interpretation can be admitted which is inconsistent with the language candidly understood, nor any which, though consistent with the words used, would not give them a reasonable operation. (See Coleridge, J. in *Fellows v. Clay*, 4 Q. B. 316, 317.) The preamble of the Act states, that it is

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expedient to amend and consolidate the laws relating to bankrupts; and the object of the Act, like that of the former Consolidation Act (6 Geo. 4, c. 16), as well as of prior Bankrupt Acts, is, to support commercial credit, and herein to benefit creditors, to prevent fraud, and to relieve the unfortunate trader who has followed the known rules of honesty and integrity. The Act provides that various debts and demands, whether contracted in the course of trade or not, shall be proveable under the bankruptcy; that the Court shall have power to examine the bankrupt touching all matters relating to his trade, dealings, or estate, and any other person the Court may believe capable of giving information concerning his person, trade, dealings, or estate, or any act of bankruptcy committed by him, or any information material to the full disclosure of his dealings; that all the estate of the bankrupt, and (see *Wright v Fairfield*, 2 B. & Ad. 727, 732) every beneficial matter belonging to his estate, shall pass to his assignees for the advantage of his creditors; that the effect of the certificate shall be to discharge the bankrupt from all debts due by him when he became bankrupt, and from all claims and demands made proveable under the bankruptcy; and although the Act has provided a new tribunal for the consideration of the certificate, it expressly reserves to every creditor, who gives notice of his intention to oppose, the right of being heard by the Court against the allowance of the certificate. Such being the spirit and general tenor of the Act, what say the 198th and 256th sections? The statutable meaning of the term "trader," used in reference to a bankrupt or to bankruptcy, may be, I think, as it were, historically explained. In the earlier Bankrupt Acts, the word "trader" is not to be found. The statute 13 Eliz. c. 7, and the two Acts passed in the reign of James I., which formed the code of law for more than a century, provide, "that any merchant or other person using the trade of merchandise by way of bargaining, &c., or making his trade of living by buying and selling, who shall depart the realm, begin to keep house, or do certain other

acts, shall be," in the words of the statute of Elizabeth, "reputed, deemed, and taken for a bankrupt," and in the words of the statute of James, "accounted and adjudged a bankrupt to all intents and purposes;" and the statute 13 Eliz. c. 7, s. 2, states, "that the Lord Chancellor for the time being, upon every complaint made in writing against such person or persons being bankrupt as is before defined, shall have full power by commission under the great seal to name, assign, and appoint the persons therein described to take by their discretion, order, and direction with the body of such person, &c.;" and the statutes of James (1 Jac. 1, c. 15, s. 3, and 21 Jac. 1, c. 19, s. 3) enact, "that the like commissions which are provided by the former Act (13 Eliz.) against any bankrupt therein described, shall be had and taken against such person and persons that are herein expressed to be bankrupts," &c. The 5 Geo. 2, c. 30, which extended the description of persons to be subject to the statutes, says (sec. 39)—"Bankers, brokers, and factors, shall be, and are hereby declared to be, subject and liable to this and other the statutes made concerning bankrupts." The 13 & 14 Car. 2, c. 24, a declaratory Act concerning bankrupts, is, I think, the first statute in which the term trader is used. It says that no person holding stock in the East-India Company or the Guinea Company shall, by reason of such adventure of their moneys, "be adjudged, taken, esteemed, or reputed a merchant or trader within any statute for bankrupts, or be liable to the same." Then the 6 Geo. 4, c. 16 (for some years the great Consolidation Act in bankruptcy), introduces the term, "trader liable to become bankrupt." It enacts that bankers, brokers, and various other dealers, enumerating them, shall be deemed "traders liable to become bankrupt," and the Lord Chancellor, upon petition made to him in writing against any trader (a shorter and more convenient term than "person or persons being bankrupt as is before defined," used in the stat. 13 Eliz.) having committed any act of bankruptcy, by any creditor of such trader, is, by commission under the great

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seal, to appoint such persons as to him shall seem fit, who shall, by virtue of the Act and commission, take order and direction with the body of such bankrupt, and with his lands, &c., and the Commissioners, upon proof of the petitioning creditor's debt, and of the trading and act of bankruptcy of the person against whom such commission is issued, shall thereupon adjudge such person bankrupt; and the subsequent Act (5 & 6 Vict. c. 122, s. 10) enacts, that certain other persons specially named "shall be deemed traders, and subject and liable as traders to this and the other statutes relating to bankrupts." The Bankrupt Law Consolidation Act contains a similar enactment to that in the 6 Geo. 4, c. 16, that certain persons and dealers enumerated "shall be deemed traders liable to become bankrupt;" and the enactment is introduced with the words "with respect to persons liable as traders to become bankrupt." I take the word "trader," then, as used in the Bankrupt Acts, to be a genuine term, denoting a class of persons made liable to become bankrupt, and to be subject to the bankrupt law; and "to regard the conduct of the bankrupt as a trader," seems therefore to require regard to his conduct, not merely in the course of the particular trade which he carried on, but as one of such class of persons made liable to become bankrupt, and thereby subject to the statute relating to bankrupts, by which statute all his estate of every description, whether acquired in the course of his trade or otherwise, is divisible amongst his creditors; and all his creditors of every description, whether in respect of debts contracted in the course of trade or otherwise, are to share rateably in the division of such estate, with an exception in favour of some very few who are to be paid in full. Now, it is very material to observe that the bankrupt law, in admitting creditors to come in under a bankruptcy, makes no distinction between debts contracted by the trader in the course of his trade and any other debts. Indeed, the law goes further. In the case of *Bailie v. Grant*, 9 Bing. 121 (also reported in 1 Clarke & Fin. 238, and 2 Moore & Scott,

193), determined in the House of Lords, the opinion of all the judges was taken, and it was decided that a commission of bankruptcy may be supported on a debt accruing before the bankrupt became a trader, and an act of bankruptcy committed after he ceased to be a trader. The Lord Chief Justice Tindal says, "The debt contracted before trade, but remaining unpaid at and after the time the debtor enters into trade, appears to be a subsisting debt for every purpose, and subject to every consequence which belongs to a debt originally contracted during trade." The reasons given by the Lord Chief Justice for the judgment in that case appear to me of great weight in the present case, and lead to the conclusion that all debts proveable must be treated as debts contracted by the bankrupt as a trader, within the meaning of the Bankrupt Law. His lordship says, "It is the same with respect to the trader's ability to carry on his trade. The money lent to the person who afterwards commences trade may be, and often is, the capital upon which the trade itself is carried on. At all events, the credit given to the trader by the forbearing to demand repayment, is one of the sources from which such capital is derived, and is the same in effect as a new loan. Again, the debt is attended in both cases with the same consequences as to the trader's ability to repay it; for in each the power of repayment is equally affected by the success or failure of the trader." Then his lordship adds, "No one would contend that a debt contracted during the period of trading, though not a trade debt, but contracted for private purposes, and applied to private occasions perfectly distinct from the trade, is to be considered as differing in any respect from a debt contracted in the course of the trade itself." Following the reasoning of the judges in the above case of *Bailie v. Grant*, I think "conduct of the bankrupt as a trader" must be regarded with reference to all matters of or relating to the bankrupt with which the statute actually deals, and must necessarily embrace conduct in the mode of contracting any of his debts whatever. Is it reasonable that a

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person should be permitted, as against his creditors, to put off and resume the character of a trader at pleasure? Surely any conduct of the bankrupt, from the civil consequences of which he seeks a discharge under his bankruptcy, ought to be deemed conduct as a trader. But further, I think the words "before as well as after his bankruptcy" are deserving of remark. It appears to me more difficult to apply the term "trader," in the narrow sense contended for, to a bankrupt after his bankruptcy. An uncertificated bankrupt after his bankruptcy, cannot trade as against his assignees; if they interfere, he would be acting merely as their agent; if the assignees do not interfere, he may certainly trade on his own account (see *Tyson v. Chambers*, 9 M. & W. 469; *Whitmore v. Gilmour*, 12 M. & W. 808; and *Herbert v. Sayer*, 5 B. 965); but the Legislature could hardly intend to direct the attention of the Court solely (if at all) to his conduct in trading on his own account after his bankruptcy (a trading in which his assignees and creditors under the bankruptcy would have no interest), and to exclude from the consideration of the Court his conduct in matters wherein he was acting as agent to his assignees, more especially when the Legislature contemplates the probability of his so acting, as appears by the power given to the assignees (12 & 13 Vict. c. 106, s. 150) to appoint the bankrupt to carry on the trade for behalf of the creditors, and in any other respects for administering his estate in such a manner as they may think best. Then, again, I think the 256th section of the Bankrupt Law Consolidation Act also affords a solution of the meaning of the words "conduct as a trader," in the 198th section. The 256th section enumerates certain offences (nine in number), some supposed to have been committed after, some before, bankruptcy, and having relation generally to the bankrupt's trade, dealings, or estate, or to any of his creditors, and which offences may or may not have been committed in the course of his trade, or as a trader in the sense contended for; for instance, destroying any book, &c. relating to his trade, dealings, or estate, with

intent to conceal the state of his affairs, or defeat the objects of the law of bankruptcy—making false entries, or wilfully altering any book relating to his trade, dealings, or estate, with like intent—contracting any of his debts by any manner of fraud, or by means of false pretences—giving undue preferences to any of his creditors in contemplation of bankruptcy with intent to diminish the sum to be divided—attempting to account for any of his property by fictitious losses or expenses—making a vexatious defence to any suit for the recovery of any debt or demand proveable under the bankruptcy, &c. The section seems to suppose that any of these offences may have been committed by the bankrupt “as a trader” within the meaning of the Act. Observe the words—“If at any sitting or adjourned sitting for the allowance of the certificate of any bankrupt, it shall appear that he has committed any of such offences, the Court shall refuse to grant such certificate, or shall suspend the same for such time as it shall think fit, and shall refuse to grant protection.” The term, “conduct as a trader,” in the 198th section, cannot, I think, consistently with the assumption in the 256th section, be confined to conduct in the course of his trade. For the reasons, therefore, which I have given (from the general importance of the question) at greater length than I should otherwise have done, I am of opinion that the construction of the 198th section, in conjunction with the 256th section (for, although the latter follows some distance in the Act, it may be considered as virtually incorporated with the power), is this: that the Court is to regard the conduct of the bankrupt as one of a class of persons liable to be so adjudged, before as well as after his bankruptcy, and herein to regard his conduct in any matter concerning which the Court is authorized to call for information and discovery, always bearing in mind that the statute contains provisions expressly limiting the power of inquiry to such matters as relate to the person, trade, dealings, or estate of the bankrupt, or any act of bankruptcy committed by him; and if it shall appear on the hearing for the certificate that the

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bankrupt has committed any of the offences mentioned in the 256th section, the Court must refuse or suspend the certificate for such time as it shall think fit. In other cases the Court (in the words of the 198th section) is "to judge of any objection against allowing such certificate, and either find the bankrupt entitled thereto, and allow the same, or refuse or suspend the allowance thereof, or annex such conditions thereto as the justice of the case may require." This appears to me to be the fair, sound, legitimate construction of the Bankrupt Law Consolidation Act with respect to the certificate of conformity. To adopt the narrow construction contended for would, I think, operate only to enable a trader to commit frauds, to release broken promises, and to defeat just creditors; whilst the more liberal construction which I have given is supported, I think, not only by the reasonableness of the thing, but by the words of the statute itself, as explained by the whole course of legislation in bankruptcy, with respect to traders, and by the reasoning of all the judges in the case which I have before cited of *Bailie v. Grant*, 9 Bing. 121, in the House of Lords; and following such construction, the intention of the Legislature will be followed out, and justice is promoted. Having disposed of the legal objection, I proceed to deal with the case upon its merits. Jardine, the bankrupt, was a draper; he succeeded to the business of his father, which had been carried on in the town of Dartford for half a century. He was also actuary of the Savings Bank at Dartford, for a period of about thirty years—that is, from the first establishment of the bank, in 1816. For the first two or three years he acted as the assistant of his father, who was the founder of the bank, and subsequently, the duties becoming onerous, he was appointed to act solely, at a fixed salary, and he continued to do so up to the time of his bankruptcy. It may be concluded, then, that the bankrupt, previous to the discovery of his delinquency, had long enjoyed the respect and esteem of the inhabitants of Dartford and its vicinity. Moreover, he had at different times been selected to

fill offices of honour and trust in his native town ; in fine, he was regarded, in every sense of the term, as an honest trader. The sequel will show how far he abandoned all title to the appellation. In the course of his business, the bankrupt had pecuniary difficulties to contend with, arising from a declining trade and reduced capital : in this state of things, in his position as actuary of the Savings Bank, being in the habit of receiving money from depositors, he was tempted, in the year 1844, under a pressure which he says was temporary, to apply the money of the bank to his own uses. I have no doubt that the bankrupt intended and believed that he should be able to replace the money ; but one trick often needs a great many more to make it good, and the bankrupt, unhappily for others as well as himself, too readily yielded to this evil suggestion. It is said that he did repay some of the moneys which he had appropriated. I fear, however, this was done by the aid of subsequent deposits ; at all events, he goes on misapplying moneys intrusted to him as actuary, and thus fraudulently incurs fresh liabilities. It is urged that he had to struggle against misfortunes—losses by bad debts and stagnation of trade, followed by contagious sickness in his family. It might be hard in such distress to bear up against the storms of fortune ; but no change of circumstances can absolve a man when he relinquishes truth and faithfulness—"the band that knits together and supports all compacts,"—and has recourse to a system of fraud, supported by artifice and falsehood. The course he pursued was, when money was brought for investment in the bank, to enter it in the depositors' books, in all instances correctly, but in respect of the moneys which he misapplied, he omitted his next important duty, which was to enter the money so received in the cash-book of the bank, which was kept by himself. The bank ledger was kept by another clerk, and it was the duty of this clerk to post the cash-book ; but the bankrupt having withheld entries of various sums from the cash-book, was necessarily the cause of the omission of those amounts in the ledger. The cash-book purported to

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contain entries of all deposits received by the actuary. It appears, then, that the bankrupt, a trader, 'who, from his long standing in trade, and the public offices he had filled, ought to have been an example to others, as one "having a good conscience—willing to live honestly in all things," instead of despising a repetition of practices constantly coming in competition with the first principles of commercial life, shows a wretched regardlessness of what is due to himself and society, and scruples not to prop his credit by schemes of treachery systematically sustained for about five years. With this weight upon him, or during the times of its accumulation, his present trade debts were contracted, and when he was found to be a defaulter to the savings bank, he made an assignment of all his property to the trustees of the bank. This act, which was done to benefit the trustees, under an apprehension that they were entitled to be paid in full by virtue of the statute 3 & 4 Wm. 4, c. 14, has, in truth, been the means of securing for the latter a rateable division of the bankrupt's property. If this assignment could have been carried out, the general creditors would have got nothing. Most fortunately also for the general creditors, the trustees of the savings bank failed in their attempt to bring their claim against the actuary within the provision of the 3 & 4 Wm. 4, c. 14, s. 28, which gives to trustees of savings banks a right to be paid in full (and in preference to other creditors, however meritorious their claims may be), all money, which any officer of the bank may have received by virtue of his office or employment. I thought (and the Vice-Chancellor confirmed my judgment) that the actuary was not authorized by the rules of this bank to receive deposits. One of the managers or committee-men ought to have attended for that purpose. It is not pretended, however, that any neglect of the managers of the bank can palliate the violation by the bankrupt of the confidence reposed in him. He was in a situation above suspicion :—how humiliating the position in which he now stands ! Indeed, there is no vice which does so cover a trader with

shame as to be found false and perfidious in pecuniary matters. Mr. Linklater states that the bankrupt has met with commiseration and sympathy from many quarters. I think it right, therefore, to say a word upon the very serious nature of his offence and misconduct. "The consideration of what is essential to the security of savings banks is a subject of peculiar delicacy and extraordinary importance—one upon which the mere existence of a doubt is a grave and most serious evil. To promote habits of frugality and saving among the labouring population, by providing them with a perfectly secure depository, is the object of all legislation upon savings banks. It is impossible to conceive a more benevolent purpose, or one which more deeply affects the well-being of the whole commonwealth; and if there be a public fund more sacred than another, that to which the greatest sanctity should belong, and which should be beyond the reach of all suspicion, is the fund which the poor have been enabled, by an almost heroic forbearance, to treasure up against future want."
 "The poor save, they seek to have safe depositories of those savings, and they further hope to be able at any time, if unforeseen want presses upon them, to have power over the money which they have deposited." The observations which I have just cited are too true to admit of doubt or controversy. The writer goes on to ask, "How has Parliament dealt with this fund?" That is a point upon which it is not my province at the present time to enter; but, taking the law as it is, and finding that the bankrupt was debited in his balance-sheet with a sum exceeding 2,000*l.* to one of the institutions to which I have referred, it became my duty to inquire how that amount of debt was contracted, and having so done, I must give judgment as on a matter of right or wrong. In awarding punishment (if refusing or suspending the certificate can properly be so called, when the granting of it ought to be deemed a positive approbation), the Court should consider the baseness and dangerous tendency of the offence, the deliberation and wilfulness, or the inconsideration, suddenness, or surprise

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with or under which it was committed, and any other circumstances which may aggravate or extenuate the guilt ; and in the present case the Court should especially look to the paramount importance of sustaining the confidence of the industrious classes in the officers of savings banks. In conclusion, I would observe, that this is one of the numerous instances which now almost daily occur, exhibiting the want of a public prosecutor. The bankrupt has committed a most grievous public offence, but in respect of that, the public justice of the country has not yet been satisfied. I am to look at the case, however, simply in a commercial point of view ; and, confining my attention to the conformity of the bankrupt to the law of bankruptcy, and to his conduct as a trader within the meaning of the Bankrupt Law Consolidation Act, I think it would be a monstrous perversion of the spirit and intention of that Act to hold a person entitled to a discharge from civil obligations which he has contracted, in the manner and under the circumstances I have pointed out, and whose conduct has been in the last degree reprehensible in having carried on trade, not merely on a fictitious credit, in the ordinary sense of that term, but upon a credit upheld by his embezzlement of bank deposits, the small savings of the laborious classes—a species of fraud heartless in the extreme, and most mischievous in its consequences. I should add, that I think the bankrupt has committed an offence (No. 3) under the 256th section, in respect of some money received from depositors subsequently to the 11th of October, 1849, and which he also appropriated to his own use ; and considering the repeated similar acts previously, I deem this offence to have been committed under circumstances of great aggravation. It now, therefore, only remains for me to adjudge that the allowance of the certificate to the bankrupt Jardine must be refused.

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(Before Mr. Commissioner FANE.)

*Ex parte COOPER, re COOPER.**February 1st.*

THE facts are set forth in the judgment.

Mr. Commissioner FANE.—This is a most extraordinary case. It has been, as I understand, before Vice-Chancellor Knight Bruce, sitting in bankruptcy, and before the Lord Chancellor, both of whom disclaimed jurisdiction, and now it comes before me as having the primary jurisdiction under the Bankrupt Law Consolidation Act, 1849. It is a petition by a Lieutenant Cooper, who was adjudged bankrupt in 1831, praying that he may have leave to file a bill or claim in Chancery to enforce the due performance of several trusts vested in the late Mr. Josh. Strutt, in which trusts the petitioner alleged he has an interest, because, if duly enforced, there would be such a sum coming to his assignees for principal and interest as would pay all his debts and leave him a considerable surplus. I might dispose of the case perhaps by saying that, upon the petitioner's own showing, the proper persons to file a bill or claim would be his assignees, and that I, sitting in bankruptcy, have no authority to compel the Court of Chancery to permit him to sue on rights which, if they exist at all, are vested in his assignees. But I will not pursue that course, because he might then shift his ground, and pray that I would compel his assignees to allow him the use of their names in Chancery, he giving a proper indemnity to them against costs. Had his petition asked this relief, it would have been right in form, and I will therefore deal with the matter as though the petition had so prayed. Assuming that such had been the prayer of the petition, a question, not of law, but of discretion, would have presented

Semble—That neither the Lord Chancellor nor the Vice-Chancellor acting in bankruptcy has jurisdiction to give a bankrupt permission to file a bill to enforce the performance of trusts in which he claims an interest.

The proper prayer of a petition to the commissioner praying leave to file a bill, &c. is, that the assignees may be ordered to permit the bankrupt to use their names upon having a proper indemnity against costs.

Where it appears that the bankrupt has an interest in certain trusts, and claims compensation for losses caused by the conduct of the trustees, the proper course for him to pursue is to ask the commissioner to summon the trustees and all proper parties to produce the deeds.

Petition by the bankrupt for leave to file a bill dismissed with costs.

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itself for consideration,—viz., ought I, or ought I not, to sanction the proposed suit?—the decision of which question depends upon the circumstances of the case. They are very complicated, and somewhat loosely stated. The substance, however, seems to be this :—In 1781, on the marriage of Mr. and Mrs. Cooper, the petitioner's father and mother, 4,000*l.* was vested in two trustees, Mr. Douglas, the father of Mrs. Cooper, and one Brown, upon certain trusts, the benefit of which, in the events which happened, centred, to some extent, at least, in the petitioner, or one of six children of the marriage. Brown died, leaving Douglas surviving. Douglas died in 1796. His personal representative was the late Mr. Josh. Strutt, who, being named by Mr. Douglas an executor, alone proved the will. Mr. Josh. Strutt took charge of the 4,000*l.*, and advanced it to Mr. Cooper, the petitioner's father, on mortgage of certain estates, and on repayment in March, 1810, again advanced it to Mr. Cooper, the father, in April following, on mortgage of an estate called the "Woodeave's Estate," where Mr. Cooper appears to have had a cotton-mill. This 4,000*l.*, it is alleged, was lost by the insufficiency of the security, or in some other way, before March, 1831, when the petitioner became bankrupt; he says that it has never been accounted for either to him or his assignees. He complains that his assignees never asserted his rights, and he now asks to be allowed to do so, using their names. This is the first of the alleged breaches of trust. The next, as alleged, arose thus :—Mr. Douglas, the father of Mrs. Cooper, the petitioner's mother, carried on the business of a cotton-spinner, in partnership with Mr. Cooper, the petitioner's father, and a Mr. Matchett, at the Woodeaves Mill. The partnership was for forty-two years, ending April, 1826. Mr. Douglas died in 1796, having, by his will, left one-tenth of his interest in that business for the benefit of the children of his daughter, Mrs. Cooper, equally. The profits were to be accumulated for each child till it attained twenty-one, and then each was to enjoy his own share. Mr. Douglas named Mr. Josh. Strutt, who was also his son-in-law, and therefore uncle

by marriage of Lieut. Cooper, his executor, and Mr. Josh. Strutt proved the will, and thus became trustee, as it is alleged, for the children of Mrs. Cooper. It is then stated that the accumulations for the children appear by the books of the firm to have amounted, on the 1st of January, 1816, to 7,355*l.*, but that on that day Mr. Strutt permitted 5,133*l.*, part of those accumulations, to be handed over to Mr. Cooper, the father, and that in 1825 the accumulations had again amounted to 3,006*l.*; but in April, 1826, when the forty-two years' partnership expired, they had been again reduced to 276*l.* These facts, it is alleged, constitute a second breach of trust, for which Mr. Strutt was accountable to the children of Mrs. Cooper. A third breach of trust is said to have arisen thus:—On the 28th February, 1823, Mr. Josh. Strutt executed a deed, to which he was himself party of the first part, three of the petitioner's sisters and the petitioner were parties of the second part, and Mr. Strutt himself, John Douglas Cooper, the petitioner's brother, and a Mr. Higginson, were parties or trustees of the third part; whereby Mr. Josh. Strutt, in consideration of *love and affection*, paid to John Douglas Cooper and Higginson 4,000*l.* upon trust to invest that sum in the names of himself, Strutt, Cooper, and Higginson, upon certain trusts, as to one-fourth, for Clara Elizabeth Cooper, until she should become bankrupt or insolvent, then for the trustees to apply at their discretion for her benefit, and after her death, to apply as she might by will or deed appoint; and in default of appointment, for her children equally; and in default of children, for her surviving brothers and sisters, except John Douglas Cooper; and as to the other three-fourths, for Lieutenant Cooper and two other children of the late Mrs. Cooper in the same way. This 4,000*l.* was immediately advanced, the petition does not state to whom, under deeds of the 24th and 25th March, 1823, on the security of the Woodeaves estate before mentioned. The 4,000*l.*, it is alleged, has also vanished, and this is stated as a third breach of trust, in respect of which the assignees might and ought to sue proper persons, and amongst

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those, the representatives of Mr. Josh. Strutt, who died in 1844. Under these alleged circumstances, the questions I am called upon to consider are—1st. Whether the assignees ought to sue; and 2nd. Whether, if they decline, on account of the risk attending the prosecution of so complicated a suit, after such a lapse of time, I ought to compel them to allow the petitioner to use their names, he giving a proper indemnity against costs. Now I entertain great doubt whether there was ever any breach of trust whatever. I will take each alleged breach in its turn. First, then, as to the 4,000*l.* settled in 1781. The benefit of that trust vested partially in the petitioner as early as 1823, for in that year Mrs. Cooper died, having survived her husband some years, and then one-sixth at least of that fund belonged to the petitioner. He attained twenty-one in 1817. In 1823, therefore, when his mother died and his rights arose, he was twenty-seven years of age. Is it likely that neither he, nor his brother or sisters, knew of their rights under their father and mother's marriage settlement? Can it be supposed that his elder brother, John Douglas Cooper, and his sisters, were ignorant of them; and can it be supposed, but that if one knew of them, all must? The strong probability is, that all knew the circumstances, acquiesced willingly in what was done, and were all extremely glad to accept the benefits conferred upon them by the deed of gift executed by Mr. Strutt in their favour, on the 28th February, 1823, the very year in which the mother died, and their interests under the deed of 1781 vested in them. There was indeed, at that time, an additional reason why they should feel under great obligation to Mr. Strutt, for the deed of 1823 was constructed expressly to secure them from the risks of partnership and bankruptcy in which they were involved, or might have been advised they were involved, by accepting the one-tenth of the profits of the Woodeaves Cotton Mill business, under their grandfather Mr. Douglas's will, who had then been long dead. That that business was not very flourishing, is shown by the petitioner's own statements, for he him-

self says that, out of 7,355*l.* accumulated before 1816, 5,133*l.* was passed to the account of John Cooper, the father, on the 1st of January, 1816, probably to meet losses; and that the subsequent accumulations, which in 1825 had risen to 3,006*l.*, had, in 1826, when the partnership expired, dwindled down to 276*l.* It is suggested that Mr. Strutt's acquiescence in the transfer of the 5,133*l.*, and the subsequent loss of the 3,006*l.*, constituted a breach of trust by him as executor of Mr. Douglas's will; but the high probability is, that if the circumstances could at this distance of time be fully investigated, it would be found that these accumulations, being trade profits, vanished under the influence of trade losses, and that Mr. Strutt was in no way responsible for them. As for a breach of trust, I presume the petitioner and his advisers do not suppose that Mr. Strutt was to carry on the business as trustee for the children, and when profits were made, set them aside for the children, and when losses occurred, bear them himself.

With regard to the third breach of trust, arising out of the alleged loss of the 4,000*l.* generously given by Mr. Josh. Strutt to his brother-in-law's children, in February, 1823, the claim is, to say the least, most ungenerous; but it is as unfounded as it is ungenerous. The fund was safely invested by the trustees, Josh. Strutt, John Douglas Cooper (the petitioner's brother), and Higginson, on the security of the Woodeaves farm, and that farm was sold in January, 1831, for 11,403*l.*; and it appears by the petitioner's own statement that deeds were then executed, dated the 7th and 8th days of January, 1831, whereby, after reciting the whole history of the two trusts,—that of 1781 and that of 1823,—and the cessation of the partnership of Matchell, Cooper, and Co., in 1826, and tracing what had become of the interests of the several persons interested in that partnership, including the whole of the Cooper family, it was stated that out of that 11,403*l.*, 4,000*l.* was paid to Josh. Strutt, as trustee under the deed of 1781; 4,000*l.* to Josh. Strutt, John Douglas Cooper, and Higginson, as trustees under the deed of 1823;

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and the balance, 3,403*l.*, to the different members of the Cooper family, in whom the Woodeaves Mill property appears to have been vested, in certain proportions. Up to this point there appears no ground for supposing any breach of trust by either Mr. Strutt, or Messrs. Strutt, Cooper, and Higginson. The trust funds were safe and in the hands of the trustees. But it may be said, what became of those funds afterwards? The answer is obvious. It appears by the petitioner's own statement, that from 1826, when the forty-two years' partnership expired, down to March, 1831, Lieutenant Cooper had been a sleeping partner in the cotton-mill business, which had been carried on by his brother, John Douglas Cooper, and himself, at Woodeaves Mill, in partnership, and that partnership had become bankrupt, and a commission had issued against the two brothers in March, 1831. The proceedings were produced before me; and it appeared by the solicitor's bill, filed amongst them, that the assignees and their solicitor inquired most carefully into the transactions of 1831, and the Strutt family and their solicitor furnished every necessary information, and produced all necessary documents to satisfy the assignees. The assignees appear to have been satisfied; and the probability is, that the inquiry then made clearly showed that all the interests of Lieutenant Cooper, whatever they might have been,—his interest under the deed of 1781, his interest under the will of Mr. Douglas, and his interest under the deed of gift of 1823, including those he derived by representation from the deceased members of his family, were either pledged to individual creditors before his bankruptcy, or realized under it. It is unreasonable to suppose that the investigation then made was otherwise than full and satisfactory. There were ample funds to pay for inquiry, for the estate paid 7*s.* in the pound and upwards, and therefore it is probable that the inquiry was an active one. But if it were not so, and if further inquiry were now necessary, the proper course would be, not to ask me to compel the assignees to allow the use of their names as plaintiffs in a Chancery suit,

but to ask me to summon the proper members of the Strutt family, or their solicitor, to produce all the deeds which were executed in or about January, 1831, and with the aid of these documents to investigate the case afresh. The present proceeding, therefore, is altogether misconceived, and I feel that it is my painful duty to dismiss this petition with costs. But I should be glad to hear that the assignees had voluntarily waived their right to costs. It is due to the memory of the late Mr. Strutt, who is charged with these breaches of trust, and who died in 1844, to observe, that besides making the kind and careful provision for Lieutenant Cooper which he did in 1823,—a provision carefully framed to protect him from utter destitution, if his being involved in the liabilities of the Woodeaves cotton-spinning business, under Mr. Douglas's will, should bring him to bankruptcy,—Mr. Strutt also left him an annuity of 50*l.* a year by his will.

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Re FOWLER.

Thursday,
February 6th.

THE facts are set out in the judgment.

JUDGMENT.

The question in this case was, whether Mr. Fowler was a builder within the bankrupt law. It appears that he was an architect, but that not being satisfied with the revenue derived from that source, he took a piece of ground in Grosvenor-square, on which a house stood, and having pulled down the house and erected one in its place, offered the new-built house for sale or other disposition. He then took the ground on

Builder—
Meaning of
the term in the
statute.

A person
who exercised
the profession
of an architect,
and purchased
several pieces
of ground in
different places,
and pulled
down the
buildings
erected there-
on, and built
new houses
with mate-

rials which he bought for that purpose, and did not employ a builder to carry on the works, but did himself pay the several persons employed thereon, with the intention of selling or otherwise disposing of the ground and the buildings so erected thereon, is a builder within the meaning of the bankrupt laws.

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which the late Mr. Hope's house stood, in Duchess-street, and proceeded to erect on it thirteen new houses, and these also he built for sale or other disposition. Since then he has taken the ground on which a large house stood in Harley-street, and has pulled down the house and built two other houses on the site. These, also, he built for sale or other disposition. He did all these works as a builder, not employing a builder, but buying materials, and employing masons, bricklayers, carpenters, joiners, and other persons, to do the work, sometimes paying by contract, and sometimes paying day wages. It appears that he employed a foreman and timekeeper. Now I admit that by the old law, and before the word "builder" was inserted in the Bankrupt Act, a person so acting would not have been liable to the bankrupt laws. He would not have been liable, because traders only were liable, and none were deemed traders except those who bought and sold *personal* chattels. Buying a real chattel, converting it into a personal chattel, and selling it when so converted, was not a trading; and hence he who took a coal-mine, severed the coals, and sold them, was not a trader: he did not *buy* a personal chattel, he bought a real chattel. And so he who bought personal chattels, converted them into a real chattel, and sold them so converted, was not a trader: and hence a person who took land for a time, built on it, and sold the buildings, was not a trader: he did not sell a personal chattel, he sold an interest in land. These niceties occasioned inconvenience. It was evident that persons who took leases of land to build on and sell, or let the houses when built, were substantially traders, and ought to be subject to the incidents, and have the benefit of the law of bankruptcy; and the word "builder" was inserted in the bankrupt law as a description of a new class of persons, thenceforth to be comprised in the provisions of bankrupt law. But, it may be said, what is a gentleman who builds on his own estate a number of houses to improve his property,—is he a builder, liable to the bankrupt law? Perhaps not: first, because he confines his transactions to his own estate, and

therefore there is not anything like a general trading ; and, secondly, because there is no ground for presuming that he will extend his operations beyond his own estate. But that argument does not apply to the case of a person who takes ground expressly for the purpose of building houses on speculation, first in one place, then in a second, then in a third, and so on, and does it evidently to make a livelihood,—such a person is, in my opinion, emphatically a builder within the bankrupt law. He is the very person to whom the Legislature intended to give the protection, and on whom it intended to fasten the responsibilities of the bankrupt law. It was urged before me, that Mr. Fowler never built for any person but himself ; that he would not have built like a common builder on the order of any customer : but to this the answer is, that such a person would have been subject to the law of bankruptcy under the old law ; and therefore, if we were to confine the lately-introduced word “ builder ” to such persons only, we should really strike the word “ builder ” out of the Act ; for it would mean nothing. I was then referred to the case of *Stuart v. Sloper*, 3 Ex. Rep. 700, and it was said that there the alleged bankrupt had done exactly what Mr. Fowler had done in this case, yet was held to be no trader. To that case my answer is, that it lays down no principle of law but this, that where a conclusion of fact is in the province of a jury, and the direction to the jury has been right, the Court will not disturb their finding. Now, in that case the question left to the jury was, whether Mr. Stuart’s proceedings were isolated transactions or not, and they found they were ; and the judges considered their finding conclusive, and declined to disturb it. Of that case I will only say, that I should have come to a different conclusion had I been one of the jury. But their conclusion is not binding on me. A commissioner of this court is jury as well as judge ; and, in my capacity of jurymen, I say that I have not the least doubt that Mr. Fowler’s were not isolated transactions, but that he meant to go on with them as long as he could make a

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profit to satisfy him, and therefore I think he was a builder within the Act, and I must decline to reverse the adjudication.(a)

(Before Mr. Commissioner FONBLANQUE.)

Wednesday,
April 2nd.

Ex parte BYFUS, *re* BYFUS.

Conditional
certificate.

Where the bankrupt, immediately previous to the fiat, disposed of goods for bills which appeared to be fraudulent, but it was not established that the bankrupt was a party to the fraud, the certificate was suspended for two years; but the condition was annexed, "that if the bankrupt should pay to his estate the value of the bills previous to the certificate becoming due, he might then apply for an immediate certificate."

THE fiat issued in 1843; immediately previous to that date the bankrupt disposed of goods to a considerable amount to one Ewards, and in payment for the same he took bills of exchange drawn by one Hart on Ewards. The bills were dishonoured. It appeared that, at the time of this transaction, Hart was an uncertificated bankrupt, and Ewards has never been heard of.

The bankrupt now applied for his certificate.

Lucas, counsel, for the assignees, and

Parry, counsel, for certain creditors residing in the country.—

This has been a fraudulent disposition of the estate, in contemplation of bankruptcy. The bills appear to be merely concocted by the bankrupt and others for the purpose of deluding the creditors. It has not been shown that such a person as Ewards ever existed.

Lewis, solicitor, for the bankrupt.—It has not been shown that the bankrupt was privy to any fraud in the making of the bills; he may have been deceived himself in the transaction complained of.

The COMMISSIONER, in giving judgment, among other remarks, said,—A gross fraud has evidently been committed in

(a) On appeal to the Vice-Chancellor, his Honour was pleased to direct an issue to try the facts as to the trading.

the concoction of these bills ; but though it is not proved that the bankrupt was a party to it, yet it is quite clear that at a time when he ought to have been particularly vigilant, and dealing with a person whom he had good reason to distrust, he was guilty of such gross and culpable negligence in parting with goods virtually the property of his creditors, as amounts as nearly as possible to a fraudulent making away with property ; on that ground I shall require him to make reparation. That which has been afforded by his brother, the other bankrupt,—the payment of a hundred pounds,—is by no means sufficient. I shall suspend Solomon Byfus's certificate for two years, unless in the mean time he restores to his creditors that which has been so improperly abstracted from them, the amount of the two bills drawn by Hart and purporting to have been accepted by Edwards or Ewards. In the event of such payment, he may apply for an immediate certificate.

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Ex parte
BYFUS,
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(Before Mr. Commissioner HOLROYD.)

Re ROBINSON.

Tuesday,
April 8th.

THE bankrupt, who was in custody under an execution, applied for his release. Assignees were not yet chosen.

Discharge of
bankrupt from
custody ;
Practice.

Hilleary, solicitor, for bankrupt.

The proper
time for the
bankrupt's ap-
plication for
his discharge
from custody
is after the
choice, unless
all parties
consent.

Lucas, *contra*.

Mr. Commissioner HOLROYD.—The object of the statute in giving the Court power to discharge a bankrupt from custody is to enable him to assist his assignees in discovering and getting in the estate. The Court is, therefore, not in a position to decide as to the discharge till after the choice, unless all parties consent. Let the application stand over till assignees have been chosen.

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(Before Mr. Commissioner GOULBURN.)

Re NEALE, Ex parte NEALE.

Practice—where the certificate has been suspended, and the bankrupt died before the time for granting the same had arrived, on an application for a certificate by the representatives of the bankrupt:

Held, that fact of the death of bankrupt ought to appear on the certificate.

THIS was an application for the bankrupt's certificate.

Bagley, counsel, was twice heard in support of the application, and

Mr. Commissioner GOULBURN ultimately directed that the allowance by the certificate should be suspended for three calendar months, from the 27th November, being of opinion that the bankruptcy was not occasioned by unavoidable losses or misfortunes. The bankrupt died on the 22nd February, 1851, before the expiration of the three months for which the certificate was suspended, and his solicitor afterwards applied for the certificate. The Commissioner intimated, that he entertained some doubt whether a certificate should be granted to a bankrupt who was no longer in existence. After consulting Mr. Commissioner Holroyd, however, the learned Commissioner stated that he saw no reason for refusing the certificate, as it might be material to the representatives of the bankrupt. He directed the fact, however, to appear on the certificate that the bankrupt was dead. The certificate, after stating in the usual form that the allowance of the certificate was suspended for three calendar months, contained the following words:—"And I find that the bankrupt departed this life on the 22nd February last."

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(Before Mr. Commissioner HOLROYD.)

Re DENNIS.*Wednesday,
March 19th.*

DENNIS was adjudicated a bankrupt under a fiat which issued in the year 1848. Mr. Bristow was chosen assignee. The bankrupt did not pass his last examination or obtain a certificate. Subsequent to that period the bankrupt commenced trading, and incurred new debts and liabilities, and in February, in the present year, was again adjudicated bankrupt in respect of the new trading, and a new petitioning creditor's debt. This was a meeting for the choice of assignees under the second adjudication.

On an adjudication against an uncertificated bankrupt, new assignees ought to be chosen.

Bagley, counsel, for the original assignees, asked that the choice might be adjourned in order that the original assignees might have the opportunity of bringing the question before the Court as to the vesting of the estate acquired subsequently to the first bankruptcy, so that litigation might be avoided.

Lawrance, solicitor, contra.

Mr. Commissioner HOLROYD.—Late cases have established that a second adjudication against an uncertificated bankrupt is not absolutely void. There is here a new class of creditors, who have a right to be represented. It may or may not appear that the original assignees acquiesced in the subsequent trading, and it is necessary, therefore, that there should be some persons before the Court to represent the new estate in case of any question arising between the creditors under the old, and those under the new bankruptcy. The choice must be proceeded with. (*a*)

(*a*) See *Ex parte Bourne*, 2 G. & J. 137; *Ex parte Welsh*, Mont. 276; *Ex parte Devas*, 4 D. & C. 366; *Ex parte Jungmichael*, 2 M. D. & D. 471; *Ex parte Butler*, ib. 731.

1851.

(Before Mr. Commissioner FONBLANQUE.)

Re NORTHOWER.First-class
certificate.

THE bankrupt purchased a share in a patent which turned out a failure. The adjudication was on his own petition, and the estate showed assets to the amount of 20s. in the pound.

The COURT was pleased to grant an immediate certificate of the first class.

(Before Mr. Commissioner EVANS.)

Saturday,
*April 5th.**Ex parte* EDWARDS, *re* HAMER.

Equitable
mortgage ;
Fixtures.
Fixtures on
premises
charged by
way of equi-
table mortgage
pass to
equitable
mortgagee.

THE bankrupt was indebted to Edwards in the sum of 250*l.* secured by the deposit of a lease, accompanied by a memorandum in the following terms, viz. :—" The lease you hold as collateral security for 250*l.* I am ready to convey to you when-ever called upon so to do." There were on the premises comprised in the lease fixtures of the value of 25*l.* The premises and fixtures were sold, but did not realize sufficient to repay to Edwards the sum advanced by him. Edwards now applied to prove for the residue of his debt, and the question was, whether the fixtures formed part of his security, or whether the assignees were entitled to receive the sum for which they sold, such sum to be added to the residue to be proved for.

Bagley, for Edwards.

Jones, solicitor, for the assignees.

Mr. Commissioner EVANS, on the authority of *Ex parte Backhouse*, 2 M. D. & De Gex, decided that the fixtures passed under the equitable mortgage.

1851.

(Before Mr. Commissioner STEVENSON.)

Re HIGGINSON.*Wednesday,
March 26th.*

THIS was an application for rehearing in the case of Mr. Jonathan Higginson, whose certificate was altogether refused some time ago by Mr. Serjeant Ludlow.

The application for a rehearing of the question of certificate was made on the ground that the certificate had been refused in consequence of the absence of certain evidence which the bankrupt at that time could not bring forward, but which he was now in a position to adduce. His Honour, having heard the arguments, took time to consider, and this day delivered

JUDGMENT.

Mr. Commissioner STEVENSON.—This is a petition by the bankrupt, praying that a sitting may be appointed for the allowance of his certificate. This allowance has already been refused by my predecessor, Mr. Serjt. Ludlow, and it is to be observed that a memorandum of such refusal, under his hand, is on the file of the proceedings in this court. The grounds of such refusal are not mentioned in the memorandum, but in this petition certain grounds are stated, which, it is alleged, are those upon which this certificate was refused. The petition also states that certain facts, which were not in evidence before my predecessor, and which in consequence thereof he refused to take into consideration, were material and generally in favour of the petitioner's application, and if they had been fully before and explained to my predecessor, the petitioner believes that he would not have refused the certificate, and that these facts are such as to warrant his renewing his application for his certificate. The circumstance

Practice ; jurisdiction of commissioner ; Sec. 207 ; renewed application for certificate.

A commissioner appointed in the place of a former commissioner has jurisdiction to entertain all applications over which his predecessors had any authority ; and, therefore, where a certificate had been refused after hearing by the former commissioner, the new commissioner is competent to hear a renewed application for a certificate.

But held, also, that the 207th section of the Bankruptcy Law Consolidation Act, specifying the cases in which such renewed application might be made, has repealed the provisions of 5 & 6 Vict. c. 122, re-

lating to such renewed applications, and consequently that the Court has no jurisdiction to entertain any such application under circumstances not specified in the Bankruptcy Law Consolidation Act.

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of the original application for this certificate having been heard before my predecessor, seemed to me at first to involve some difficulty as to my power of entertaining this application, for want of jurisdiction on that ground alone, conceiving that it was open to the objection that, by so doing, I should be sitting, as it were, on appeal from his judgment. It has, however, been urged, that the fact of my appointment to this district in the room of my predecessor would be to give me jurisdiction to entertain this, as well as every other application over which he had any authority, and to as full an extent as he could have done had he remained the commissioner of this district, and, in fact, to deal with this case as if I were personally representing him ; and, after consideration, I am inclined to take this view of the case, although I cannot but feel that it is subject to great doubt. But supposing this view to be correct, the application is still open to the question of want of jurisdiction upon other grounds, which have been raised in opposition to this petition. These grounds are, that application can only be made under the recent Bankruptcy Law Consolidation Act, and in cases provided for by the 207th section—that is, when the Court shall see good and sufficient cause to believe that the refusal of a certificate has been obtained by false evidence, or by reason of any improper suppression of evidence, or otherwise fraudulently obtained, none of which cases, it is contended, occur in the present instance ; and of which there can be no doubt, nor, indeed, was any pressed on behalf of the petitioner ; but it is contended on his behalf, that the original hearing of the certificate having been under a former Act (5 & 6 Vict. c. 122), then in force, the authority to deal with this application would be under the jurisdiction conferred by that Act, and which still remains for this purpose. In the first place, with regard to such jurisdiction giving authority to rehear a matter of this description, very great doubts have always been entertained whether the Commissioners of Bankruptcy have any such authority, and I am under the impres-

sion that it is the general opinion of the Commissioners that they have no such power. In the case of *Ex parte Harris*, mentioned in the argument, and reported in the sixth volume of the *Law Times*, it appears that Serjeant Goulburn considered he had no such authority, although he referred to a case in which, under very special circumstances, a rehearing was granted. But it has been shown that my predecessor in one instance where he has refused a certificate has granted a rehearing, and subsequently allowed the certificate, and that was stated in the course of the argument; and even in this case he considered that he was not precluded at some future time from rehearing the case. Admitting that this application might have been entertained under the former Act, the question still remains whether the former jurisdiction of the Court can now be exercised in this instance. Now, unless there are any words in the Consolidation Act by which this jurisdiction has been expressly reserved, I apprehend it is quite clear that all such jurisdiction has been repealed by that Act. The first section, which repeals the former Acts, and which has been referred to on this subject, contains only this exception, which comes home as bearing on this point, viz., "except so far as may be necessary for the purpose of supporting any proceedings taken, or to be taken, under and after the commencement of this Act by any trading, &c. or other proceeding in bankruptcy before the commencement of this Act." Now, it appears to me quite impossible to hold that this word "proceeding," used in either part of the sentence, can have any reference to an application of the present description; and, besides, it would not be a proceeding taken, or to be taken, under the Consolidation Act, which directs that all proceedings in bankruptcy depending at the commencement of the Act should be proceeded with and brought to a conclusion under the provisions of that Act, and which shows, I apprehend, the intention of the Legislature to be clearly, that any application, of any kind whatever, can only be made under the jurisdiction conferred by this consolidated

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Re
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Act. Therefore, in whatever view the question of jurisdiction may be taken, in this case it appears to me that I have no authority to entertain this application, and I am bound, therefore, to dismiss this petition, which I do quite irrespective of any merits of the case, and solely for want of jurisdiction.

(Before Mr. Commissioner GOULBURN.)

Re CLAY.

In cases of disputed adjudication under the 12 & 13 Vict. c. 106, s. 104, the general rule is, that the petitioning creditor must begin, and establish any of the requisites disputed, before calling on the alleged bankrupt to show cause.

THIS was a question of disputed adjudication under the Act 12 & 13 Vict. c. 106, s. 104.

Parry, counsel, for the bankrupt.

Bagley, counsel, for the petitioning creditor.

A preliminary discussion took place as to the obligation of the parties to begin. On the part of the alleged bankrupt it was insisted that the petitioning creditor was bound, in the first instance, to examine his witnesses and establish the three requisites necessary to sustain the adjudication, precisely as if there had been no previous adjudication *ex parte*. On the other side it was suggested, that by the express terms of the 104th section, the alleged bankrupt was to show cause against the original adjudication to the satisfaction of the Court, and if he failed so to do within the period specified in the Act, the original adjudication became absolute without more; and from this provision it was argued, that the petitioning creditor had already established a *primâ facie* case, and could not be required in the first instance to produce any evidence. It was admitted at the bar that the practice in reference to this question was not settled.

Mr. Commissioner GOULBURN thought the question so

important, as matter of practice, that he consulted with his brother Commissioners, Evans and Holroyd, and subsequently announced that they had come to the unanimous conclusion, that in ordinary cases, and as a general rule, the petitioning creditor upon a disputed adjudication should be called upon to begin and adduce all the evidence on which he means to rely, in order to establish the trading petitioning creditor's debt an act of bankruptcy. The Court, however, reserved to itself the discretion of allowing the petitioning creditor to adduce further evidence at any subsequent stage of the proceeding, if further evidence was deemed necessary.

Bagley, for the petitioning creditor, then called the attesting witness to a deed of assignment for the benefit of creditors, which was the act of bankruptcy relied upon, and the witness was cross-examined by *Parry*, with a view to establish the objection relied upon.

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Re
CLAY.

Ex parte BEDFORD, *re* BEDFORD.

Thursday,
May 29th.

THE last examination of the bankrupt was adjourned *sine die* without protection; on that occasion a creditor applied for a certificate of proof under sec. 257 (Sched. B a. Bankrupt Law Consolidation Act). He then sued out a writ of *ca. sa.* in the Exchequer, under which the bankrupt was arrested, on the 22nd of April, 1850. There was no other detaining creditor, and the bankrupt, having been in prison up to the present time, he now applied for his discharge.

Jurisdiction;
Discharge of
bankrupt.

The Court of Bankruptcy alone has jurisdiction to order a bankrupt's discharge from custody. A bankrupt who was arrested by virtue of a *ca. sa.* sued out by a creditor

who obtained a certificate of proof under sec. 257, is entitled to his discharge after he has been in prison twelve months, although he has not passed his last examination.

Semble, that at the expiration of the twelve months the gaoler ought to take notice of the statute and discharge the prisoner.

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Naylor, for the bankrupt, relied on sec. 259, (a) and quoted *Walker v. Edmonson*, 20 L. J. 186, Q. B.

Cole, solicitor, contra.—The bankrupt has as yet furnished no accounts to his assignees, though he had ample time to do so. He is in the same position as when he was arrested, and is therefore not entitled to his discharge.

Mr. Commissioner GOULBURN (after having consulted Mr. Commissioner Holroyd).—This case is to be discussed wholly on sec. 259, which must be construed to mean, that where a bankrupt has been in prison for a less period than a year, he shall not be discharged without the order of this Court, but that after the year has expired he is entitled to be set at liberty; and it is questionable whether the gaoler ought not to take notice of the statute, and discharge the prisoner when the period of imprisonment set forth in the statute has expired, without any order from this Court. My opinion is founded on the following reasons:—1. This Act ought to be construed *in favorem libertatis*, in conformity with the opinion expressed by Lord Tenterden in *Lewis v. Moreland*, 2 B. & A. 64. 2. This is the first enactment in which the general principles of the bankrupt law have been interfered with. Up to the time when this statute came into operation, a creditor was obliged to elect whether he would prove under the bankruptcy, and abandon all other remedies against the bankrupt; but now having proved, and even received a dividend, he can, under certain circumstances, arrest the bankrupt. The power of detaining the bankrupt in prison ought to have a limit. 3. The process under which the bankrupt is in custody, in fact, commences in this court by virtue of the certificate of proof, although the intervention of another Court is

(a) "If any bankrupt shall be taken in execution after the refusal of protection, or after the refusal or suspension of his certificate, he shall not be discharged from such execution until he shall have been in prison for the full term of one year, except by order of the Court."

afterwards required. This Court is, therefore, the proper tribunal to order the discharge when the terms of the statute have been satisfied. 4. It has been decided in *Walker v. Edmondson*, that the Consolidation Act transfers all the jurisdiction as to the bankrupt's discharge, when he has been taken in execution, to this Court. I will, therefore, order the discharge. No injustice can follow, for this Court has now the power to compel him to furnish satisfactory accounts.

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Ex parte
BEDFORD,
re
BEDFORD.

Ordered that the bankrupt be discharged.

(Before Mr. Commissioner FONBLANQUE.)

Ex parte CROSS, *re* PIGGOTT.

Tuesday,
May 20th.

CROSS and Co., immediately previous to the adjudication, sold to the bankrupt three separate parcels of oats, and sent the same to the Eastern Counties Railway, with the following instructions, viz. :—

Stoppage *in transitu*.

The vendor sold several parcels of goods, and sent them by railway to be delivered to the purchaser; the expense of delivery was to be paid by the vendor. Part of the goods were delivered, when the vendor, having suspicions as to the solvency of the purchaser, directed the proper officer of the railway company not to deliver the rest:

“The superintendent at the March station, E. C. R.

“Sir,—About 15 qrs. W oats, ex Green; 20 qrs. W oats, ex Frear. The above two parcels of oats will be delivered at your station on Monday; please inform us of quantity and weight gross of each parcel, and forward them to the order of Mr. W. Piggott, at the Cambridge station, and charge the carriage to our account. You had better mark one parcel with a × with chalk.—We remain, yours, &c.,

“J. & T. CROSS.

“Ely, Oct. 5, 1850.”

The other parcel, being oats of another price and description, was sent in a similar way, with similar instructions.

Held, that the vendor had a right to stop *in transitu*.

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Ex parte
CROSS,
vs
PIGGOTT.

Some part of the oats had been delivered to the bankrupt ; but on the 17th of October, Cross and Co. wrote to the railway superintendent at Cambridge, reversing their original instructions, and requesting him to hold the goods on their account. At the time when such letter was written, Cross and Co. were not aware of the fact of Piggott having been adjudicated a bankrupt, although they had doubts as to his solvency. Francis Cross (one of the partners in the firm of Cross and Co.) went to the station-master at Cambridge, and told him to hold the oats for the further instructions of the firm, and that the parties to whom the oats were sold would produce an order from the firm for them. There had been several previous transactions in oats between Cross and Co. and the bankrupt.

It was the custom of Cross and Co. to pay the carriage and rent for warehousing of the oats, and the expenses of carrying the same from the company's premises to the carts sent by the bankrupt for them. The assignees claimed the whole of the goods as part of the bankrupt's estate.

Lawrance, solicitor, for Cross and Co.—The goods had not passed into the bankrupt's possession ; we had a right to stop them *in transitu*. (*Whitehead v. Anderson*, 9 M. & W. 518 ; *Tanner v. Scovell*, 14 M. & W. 28 ; *Gibson v. Caruthers*, 8 M. & W. 301. See *Mason v. Lickbarrow*, and *Lickbarrow v. Mason*, 1 Smith, L. C. 3rd edit. 388, and notes ; and *Wentworth v. Outhwaite*, 10 M. & W. 436 ; *Re Gales*, 1 De Gex, 100.)

Cole, solicitor, for the assignees.—The vendors had parted with their right to the goods, which they could not recall, and the bankrupt had the right to take possession of them, and actually did so, as to part : the taking possession of part affected the actual ownership of the whole ; and from the time when the part was delivered, the vendors' right to stop *in transitu* ceased.

Mr. Commissioner FONBLANQUE.—It may be taken as a general rule, that so long as there remains anything to be done by the vendor, or at his risk or charge, the transit is incomplete. In this case, the corn was to be conveyed from the railway warehouses to the bankrupt's waggons at the expense of Cross and Co.; and was, therefore, *in transitu*. The only doubt is, whether the bankrupt had taken possession of the whole of the corn by taking away a part of it. I am of opinion that he had not. On the 11th of October, the bankrupt signed the declaration of insolvency. On the following day he took away sixteen quarters of oats. On the 15th, the declaration of insolvency was filed, and on the 18th, Piggott was declared bankrupt on his own petition. Now it was bad enough that he should have taken away the sixteen quarters; but I will not, on that account, impute to him the intention of taking the whole forty-eight quarters, when it had become perfectly evident that he could not pay for them. The case of *Tanner v. Scoell* is much stronger than that which is now before me; I must, therefore, declare that the oats remaining in the warehouse of the railway company did not pass to the assignees.

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Ex parte
Cross,
re
Piggott.

(Before Mr. Commissioner FANE.)

Ex parte ALLCARD, re MILTON.

THE facts are set forth in the judgment.

Lawrance, solicitor, for the petitioner.—We rely on the statute of Victoria as a general statute, in which the statute of Anne, being only a particular statute, relating to one county, is merged. There having been one public registry, this case does not come within the meaning of this statute of Anne.

A judgment registered under 1 & 2 Vict. c. 110, s. 19, will not be a charge on lands in Middlesex, when it has not been registered in the county, under 7 Anne, c. 20, s. 18.

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Browne, counsel, for the assignees.—The statute of Anne cannot be affected by the subsequent statute of Victoria, unless by express words ; and as there is nothing contained in the later Acts inconsistent with or contradictory to the former, the statute of Anne must still be in full force, and be complied with in order to raise a charge against lands in Middlesex. He cited *Johnson v. Houldsworth*, 1 Sim. N.C. 106.

JUDGMENT.

Mr. Commissioner FANE.—This was a petition by Mr. Allcard, praying a declaration that a judgment debt of 138*l.* and interest due to him under a judgment entered up in November, 1849, against the bankrupt, was a charge upon certain leasehold land of the bankrupt, sold under the bankruptcy for a sum exceeding 138*l.*, and praying payment out of the proceeds of the sale. Allcard was the holder of a bill of exchange accepted by Milton, and had sued him, and had got judgment, and had registered his judgment under 1 & 2 Vict. c. 110, s. 19, so that, *primâ facie*, his title was clear under that section, and s. 13 of the same Act ; but it was objected that the land in question lay in Middlesex, and that he had not registered his judgment under the Middlesex Registry Act, 7 Anne, c. 20, s. 18 ; and I am of opinion that that objection is fatal. By that Act it is provided that no judgment shall affect land in Middlesex, but from the time that a memorial of such judgment shall be entered in the Middlesex Registry Office. To this it was answered, that I ought to construe that clause with reference to the preamble of the Act, which, after reciting the power which ill-disposed persons had of undoing purchasers and mortgagees, to the utter ruin of them and their families, by secret ways of conveying lands, &c., proceeded to make several provisions, evidently, as it was alleged, for the protection of purchasers and mortgagees, and of no one else ; and among others, the provision in question ; and it was urged that that provision, though general in its terms, ought, in construction, to be limited to cases where purchasers or

mortgagees required its protection. I cannot accede to this argument. The preamble of a bill is no doubt to be read as an assistant to the construction of any enactment in it which is of a doubtful nature, but it is not to control those which are clear. If the rule were otherwise, the preamble would be the enactment; it is, however, not at all improbable that the Legislature might have thought that if a little more publicity were given to the existence of judgment-debts in this great assemblage of traders, there would be no harm done. It was then suggested that the provision in s. 19 of the 1 & 2 Vict. c. 110, requiring the registry there specified, must have been intended to supersede or repeal the provision of the statute of Anne, for otherwise, there would be two registers of the same debt. I cannot, however, acquiesce in this argument. The one registry is applicable to the whole of England, the other to the county of Middlesex only; and I cannot conceive how a special provision for the protection of all persons interested in the lands situate in Middlesex can be repealed by a general Act, not making the slightest allusion to it. This point, however, was decided by Vice-Chancellor Rolfe, in *Johnson v. Holdsworth*, 1 Sim. N.C. note, 106. The question before him was, whether a judgment creditor, not having registered his judgment in the West Riding of Yorkshire, was a necessary party to a redemption suit relating to lands there, and he held that he was not, as he had no interest in the lands till registration in the county; and he held this, notwithstanding the argument was used, that the 1 & 2 Vict. c. 110, ss. 13 & 19, substantially repealed the Local Registry Act. I must therefore dismiss the petition with costs.

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Ex parte
 ALLCARD,
re
 MILTON.

1851.

(Before Mr. Commissioner FONBLANQUE.)

*Friday,
May 23rd.*

ANONYMOUS.

Bankrupt trustee proving against his own estate for trust fund, where the fund was small and the person beneficially interested was of unsound mind, but who had not been declared so by an inquisition—
Order as to the application of the dividends.

THE bankrupt, as executor of A. B. deceased, by leave of the Court, made a proof against his estate for the sum of 334*l.* 13*s.* 8*d.* bequeathed to him by the testatrix, in trust (among other persons) for C. D., a person of unsound mind, but who had not been declared to be so by an inquisition.

Upon the application of *Reid*, solicitor, and after reading the will of the testatrix, the Court was pleased to order that the amount of any dividend or dividends to be declared on such proof, when carried to the dividend account under the general order, be transferred in the Bank of England by the accountant in bankruptcy, to the credit of the matter of the bankrupt, to the account of the trust-estate of the testatrix, “and the said accountant is to cancel any dividend-warrants drawn for such dividend or dividends; that the said dividends, when so paid into the said bank, be laid out in the purchase of Bank Three per Cent. Annuities, in the name and with the privity of the said accountant, in trust in the above matter to the like account; and the said accountant is to declare the trusts thereof accordingly, subject to further order; and that the interest to accrue due on the said Bank Annuities, when so purchased, shall from time to time, during the life of C. D., be paid by the said accountant to the said bankrupt, and by him applied towards the maintenance and support of the said C. D., the said bankrupt producing to the said accountant, before receiving any half-year’s dividends after the first, an affidavit in the form contained in the schedule hereto annexed; and the said accountant is to hold the said Bank Annuities, and all future dividends thereon, after the death of the said C. D., subject to the further order of the Court.”

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(Before Mr. Commissioner GOULBURN.)

*Re POWNALL.**Tuesday,
June 17th.*

THE facts are set forth below.

JUDGMENT.

Mr. Commissioner GOULBURN.—The case involves two points of considerable importance with reference to the construction of the late Act of Parliament. Mr. Pownall, as a solicitor, was not liable to the bankrupt law; and, accordingly, he had at first sought another mode of relieving himself from his difficulties, by filing a petition under the Act of 7 & 8 Vict., which applied to persons not traders. The judge of the Suffolk County Court had been of opinion that he was a trader, and he had then filed a declaration of insolvency, and come before this Court. At the hearing the assignees had not opposed, and it was clear they had a very friendly feeling towards the bankrupt; but this might consist with the most high and honourable feelings on both sides, though it was more satisfactory when those representing the creditors at large looked into the case with a view to do justice to all. One creditor, however, Mr. Bedwell, a gentleman of Chelmsford, made a most strenuous opposition, both on general grounds, and on the bankrupt's conduct towards himself. He would consider both those grounds; and first as to the bankrupt's general conduct as a trader before and after the bankruptcy. It had been argued that the acts of trading were few, and small in amount, and were confined to the years 1844, 1845, and 1846, when the bankrupt was the owner of some small vessels, which he let out for the fishing-trade, and that his general conduct in matters in which he was not a trader could not be taken into consideration. The same arguments had been used in *Wakefield's* case, from Nottingham, where a merchant had improperly employed trust moneys out of his

Certificate; conduct as a trader; vexatious defence. The general conduct of the bankrupt in his dealings, &c., will be taken into consideration in the question of the certificate, although the actual trading is limited to small transactions.

A bankrupt is not justified in pleading sham pleas in an action, although it might be possible that he had a defence in equity.

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trade ; and the question had also been raised in the case of *Jardine*, the actuary of the Dartford Savings' Bank, before Mr. Commissioner Holroyd, who had gone at great length into the meaning of the words—"conduct of the bankrupt as a trader," and held that they applied to his whole conduct in the contracting of any debts whatsoever. To this view he entirely subscribed, and should act upon it. It appeared that this gentleman had been bankrupt before, a considerable time ago, in 1834, when his debts were 8,000*l.*, and he paid a dividend of 2*s.* 4*d.* in the pound. A former failure was by no means to preclude a man from attempting to regain his position, and to acquire respectability and affluence by trade ; but it ought to teach caution. In this case, he was sorry to say, Mr. Pownall did not seem to have profited much by the vicissitudes of trade. His present balance-sheet commenced on the 1st of March, 1846, when he was behind-hand 2,517*l.* 9*s.* It would have been better had he then looked his affairs in the face, and have come to this Court, or taken some means of winding up his affairs, instead of going on hopelessly increasing his load of debt, and increasing the wrong which he was doing to others. He now owed to creditors 4,198*l.*, besides what he has made himself liable to on the acceptances of other parties, which increased the amount to 4,451*l.* Deducting from this the estimated value of security in the hands of a creditor, 250*l.*, he remained liable for 4,201*l.* The profits, taken at his estimate, were 5,378*l.*, leaving him to account for 9,579*l.* To meet this he had hardly anything. His furniture, deducting the rent and taxes due, would yield only the insignificant amount of 7*l.* He alleged his good debts to amount to 1,871*l.* ; doubtful, 205*l.* ; and bad debts, 1,208*l.* But it turned out that scarcely any of them could be called good ; for they had been sold by the assignees for 300*l.* to some one who most likely had a taste for litigation and County Court proceedings. His law costs were put down at 174*l.* The expenses, partly ascertained and partly estimated, were 3,067*l.* ; and it was not very easy to make out what was

estimated, and what was not ; for Mr. Pownall, untaught by his experience of former failure, had kept his books in such a very slovenly way, that it was not easy to make them up. It seemed they were never added up at all ; and the official assignee stated that it would have been impossible to do so, as the debits and credits were frequently mixed. It was singular that a man of education, and whose business it was to advise other people, should have conducted his business with such extreme negligence. Nobody could say that this was a man who, profiting by past misfortunes, had put his shoulder to the wheel, and resolved to retrieve himself by avoiding those errors which were certain, sooner or later, to bring a person to that court. This sort of conduct began to tell, as it was sure to do ; in 1846 he was in difficulties, and petitioned this Court under the 7 & 8 Victoria ; he then owed 2,668*l.*, and it was arranged that he should pay 300*l.* into court ; but this arrangement was never carried out, in consequence of an action being brought against him by a gentleman named Last, who he said had concurred in the arrangement. That action was defended, and, as Mr. Pownall lost the verdict, he declined to pay the 300*l.* into court, as, he said, with the acquiescence of his creditors. The petition therefore fell to the ground. He then petitioned the County Court ; and his debts were very differently stated in the two petitions, which it was not easy to reconcile. The County Court dismissed his petition, and he was here, not of choice, but necessity, to get his affairs arranged upon the hypothesis that he was a trader. It was impossible to look at his general conduct without feeling that it was culpable in the highest degree ; and, if such conduct were not visited with punishment in persons circumstanced like Mr. Pownall, the Court would act unjustly towards those who had more to allege in the way of ignorance and little acquaintance with habits of business. But Mr. Bedwell also complained that the bankrupt had done him grievous wrong personally, and had put him to unnecessary expense and delay by defending an action brought against

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him, to which he had in truth no defence at all, and to which he put no fewer than eight special pleas upon the record. It was contended that this brought him within the seventh section of the penal clause of the Act, the 256th, and that he was consequently not entitled to any protection whatever. Mr. Bedwell had been attacked as one who had acted with some sort of collusion, and unjustly, towards Mr. Pownall; but he had never seen a man appear in a court of justice with cleaner hands. There was not the shadow of an imputation against him. The note, which formed the ground of the action, had been received by him from Mr. Last, executor of a gentleman of the same name, in part payment of a debt due from the deceased Mr. Last. When he brought his action, Mr. Pownall met him with his eight special pleas, every one of them alleging what was positively untrue. First, he said he did not make the note. It was now conceded on all hands that he did. Falsehoods of this kind were no light matter. It had been urged that he had a right to put his creditor to the proof of these matters, if they were true; but this proposition he utterly denied. The whole object of the judges and the courts in altering the rules of pleading led to the opposite conclusion; and they were now going further in the same direction, with a view to compel a party to state the truth, and only the truth, in answer to an action brought against him. The effect of this plea, denying that he made the note, would be to compel Mr. Bedwell to have witnesses to prove the handwriting. The next plea, that Mr. Last did not endorse the note to Mr. Bedwell, was equally untrue. Then, he denied the consideration: in support of this plea not a particle of proof was given. The fourth, fifth, and sixth pleas—alleging fraud in the making and endorsing the note—were wholly unsupported. The seventh plea alleged that the defendant had obtained a certificate under the hands of Mr. Commissioner Evans, on his application under the 7 & 8 Victoria, before the endorsing of the note to the plaintiff. It turned out that no such certificate had been

granted. Could there be a grosser untruth than that? The eighth plea denied that Frederick Last, the endorser of the note to Mr. Bedwell, was the legal executor of Isaac Last, which was equally untrue. It had been urged that because Mr. Bedwell had not proceeded to tax his costs as against Mr. Pownall, but had taken out execution merely for the debt, he had thereby been put to no unnecessary expense. But he would have to pay his own solicitor, and every one knew the difference as to costs between an undefended action and one where eight special pleas were put upon record. It was impossible to avoid the conclusion that Mr. Bedwell had been most grievously injured, and had been put to great and unnecessary expense and delay by these vexatious proceedings. It was a mistake to suppose that if a man had a muddy, confused notion that he might have an answer to a claim in a court of equity, he had therefore a right, in a court of law, to plead as many sham pleas as he chose, and to keep his creditor at arm's length, and put him to any expense he thought fit. This was to make a party a judge in his own cause; every debtor would fancy that he had a defence somewhere or other, either in law or equity, or, at all events, in morality, either in this world or the next; and having settled that point in his own mind, he would proceed, as in this case, to put a number of special pleas on the record, and pick his creditor's pocket by putting him to vexatious delay. The bankrupt was clearly within the meaning of this Act, the penalties of which were not at all too severe; for nothing could be more mischievous than the practice of purchasing time by traders, when they became embarrassed, at the expense of their creditors. It was not merely a wrong to the particular creditor, but, in nine cases out of ten, the experience of that Court showed that the time so gained was employed by traders in making fraudulent preferences, and abstracting property from the reach of the creditors at large. But in this case the question of time arose. The words of the 256th section were:—"If the bankrupt shall, within six

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months next preceding the issuing of the fiat, or the filing of a petition for adjudication," have committed the offence there stated. The eight special pleas were put on record on the 8th of February, 1850; the adjudication was not till the 31st of December in the same year, clearly more than six months after. It might be argued that in a case like this every continuance of delay and expense was a fresh offence; but he had consulted Commissioners Fonblanque and Holroyd, and they were of opinion, the statute being a highly penal one, that the offence had taken place more than six months before the filing of the petition. This was not a rule which would apply to all cases of vexatious defence, as delay might be interposed in other stages besides the pleading. The bankrupt was, therefore, exempted from the penal part of the statute, and the Court was not debarred, as it otherwise would have been, from granting him protection. By the course which Mr. Bedwell had taken in reference to the costs, there was no evidence of Mr. Pownall being indebted in these costs. Under these circumstances, it must be admitted, by accident, or good fortune, he was absolved, or escaped from the penal provisions of this Act, and remained responsible for his general conduct as a trader, and for the particular wrong done to Mr. Bedwell, without reference to the penal provisions superadded by that Act. Looking at the case as one in which there was very little to extenuate Mr. Pownall's conduct, considering his position and occupation, and the class of life in which he had hitherto moved, the Court would err very widely did it treat the case with greater leniency than was shown to persons with less education and with more excuse for their misconduct. The judgment was, that the certificate should be suspended for twelve calendar months, with protection for three months, to be renewed from time to time, unless good cause were shown to the contrary. The certificate to be of the third class.

(Before Mr. Commissioner FONBLANQUE.)

ANON.

Wednesday,
January 29th.

A SUMMONS, under sec. 78, was sued out by A. and directed to W. B., nurseryman, &c.; in the particulars of demand W. B. was described as nurseryman, cow-keeper, dealer in horses, dealer and chapman.

Trader-debtor summons; trading not to be disturbed at return of summons.

The defendant was described in the summons as nurseryman, &c., and in particulars of demand as nurseryman, cow-keeper, dealer in horses, dealer and chapman.

Bagley, in support of the summons.

Summons held to be insufficient.

Lucas, contra, referred to the statute in sec. 65, *et seq.* It is not sufficient that the affidavit states that the person suing out the summons "*verily believes*" that the debtor is "*such trader*." The truth of the affidavit must be inquired into, and it must appear that the debtor is a trader within the meaning of the statute, before it can proceed on the summons.

In the particulars of demand, the alleged debt was stated to be due in respect of money paid by the plaintiff to a third person for the use of the defendant, without stating that it was so paid by request of defendant:

Mr. Commissioner FONBLANQUE.—How can I try the trading now? Am I in a condition to summon witnesses, or to examine the defendant?

Held to be insufficient. Summons dismissed with costs.

Lucas.—Where the Court has jurisdiction, it has a power to do any act necessary to carry its powers into effect.

Bagley.—The rule referred to applies to the discretion of the Court as to ordering the bonds: the only question raised at present is as to the validity of the summons.

Mr. Commissioner FONBLANQUE.—There are two subsequent periods at which the question of trading may be raised. If a petition for an adjudication should follow, a *prima facie* case of trading must be made out; and subsequently, if the alleged trader should show cause against the adjudication obtained *ex*

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parte, he can then dispute the trading ; so that if the party summoned is not a trader, the process is vain against him. Therefore, there is no cause to apprehend that the process of the Court can be abused. There has been much doubt as to what course the Court ought to pursue in such cases as the present ; but, after much consideration, all the commissioners have agreed to a resolution that the consideration of all questions as to the validity of the trading and the other requisites to support an adjudication in bankruptcy arising out of these summonses, shall be postponed till the question of the adjudication comes before the Court.

The hearing upon the summons was then proceeded with.

Lucas.—The particulars of demand are too uncertain ; no privity is there alleged to exist between the defendant and the person to whom the money is stated to have been paid. It ought at least to appear that the money was paid, as stated, at the request of defendant. The description as cow-keeper, in the particulars of demand, cannot be taken to be included in the word “&c.” in the summons.

Bagley, *contra*. (*Gale v. Leckie*, 6 M. & S. 228 ; *Berry v. Fernandez*, 8 Moore, 332 ; 1 Bing. 338 ; *Anon.* 1 Chit. 331.)

Mr. Commissioner FONBLANQUE.—Where the debt is alleged to be due in consideration of goods sold and delivered, or work and labour done, the request of the defendant may be implied : but it is otherwise when the debt is in respect of money paid to one person for the use of another. The words descriptive of trading cannot be included in the word “&c.” in the summons, so as to cure the defect apparent on the face of the summons. The summons must be dismissed with costs.

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(Before Mr. Commissioner FONBLANQUE.)

Re DAWSON.*Thursday,
March 6th.*

THE bankrupt had been owner of the bark *Cumberland*, which was lost on her voyage. The underwriters having refused to pay, the assignees of the bankrupt brought an action and recovered 2,000*l*. The bankrupt this day applied for his certificate, which was granted of the first class.

Previously to the verdict against the underwriter, a seaman applied to prove, and to be allowed three months' wages as a servant. The Commissioner recommended him to suspend his claim till it should be ascertained whether the assignees should recover under the insurance; as, in that case, he was of opinion that the seamen would have the same rights as against the produce of the ship as they would have had against the ship herself.

Seamen's wages.

Where an insured ship was lost, and the insurance recovered by the owners:

Held, that the seamen were entitled to be paid in full out of the insurance money.

The COMMISSIONER now stated, that though he had been unable to find any direct authority on the subject, probably arising from the recent change in the law, by the 7 & 8 Vict. c. 112, s. 170, which gave to seamen a right to their wages in cases of wreck, he retained his opinion, in conformity with the general rules of equity, that as the seamen had a lien on the ship, and special remedies for the recovery of their wages, which the statute appeared to be specially framed to preserve to them, they had a right to follow the produce. The wages, therefore, must be paid in full out of the money received from the underwriters.

1851.

(Before the LORD CHANCELLOR.)

*Ex parte WOODS, re WOODS.**Friday,
May 2nd.*Construction
of sec. 198.

The commissioner has jurisdiction to adjourn a certificate meeting, in order to enable a creditor, who has failed to give notice of opposition, an opportunity of giving such notice, and of being heard to oppose the certificate at the adjourned sitting.

THIS matter came before his lordship by way of appeal on a special case, on behalf of the bankrupt, under the Bankrupt Law Consolidation Act, sec. 16, from an order of his Honour the Vice-Chancellor, to whom matters in bankruptcy are referred, confirming the decision of the commissioner, under the circumstances stated in the petition, viz.:—A public sitting was appointed for the allowance of the bankrupt's certificate under sec. 198; at such sitting one Baker, a creditor of the bankrupt, who had proved his debt, prayed to be heard against the allowance of the certificate, although he had given no notice to the registrar of his intention to oppose. The bankrupt, by his solicitor, objected to Baker being heard; but the commissioner was pleased to make the following order:—

“Memorandum, that this being the day appointed by me, and duly advertised in the *London Gazette*, for the allowance of the certificate of the said bankrupt,—Mr. Lawrance appeared as solicitor for the bankrupt, and prayed that the said certificate might be allowed, and Mr. Wilkinson appeared as solicitor for the assignees, and Mr. Cook, of counsel, appeared for George Baker, a creditor of the said bankrupt. And Mr. Lawrance objecting to the right of Mr. Cooke to oppose on behalf of the said George Baker, by reason that he had not given the registrar notice in writing of his intention to oppose; and it appearing by the statement of George John Parsons, solicitor for the said George Baker, that the omission to give such notice was accidental, this Court doth order that this sitting be adjourned generally, and doth appoint a public sitting for the allowance of the bankrupt's certificate, to be held on Friday, the 31st day of January next, at half-past eleven o'clock in the forenoon precisely, of which sitting due notice is to be given in the *London Gazette*. And this Court

doth order that the said George Baker do pay to the assignees and to the bankrupt, or their respective solicitors, the cost of and occasioned by the adjournment of the said sitting; and the solicitor of the said George Baker is to verify by affidavit, to be filed with the proceedings, his statement that the omission to give notice of opposition was accidental," &c. &c.

That on the 3rd day of January, 1851, an affidavit was filed with the proceedings in this matter, of which the following is a copy:—

"In the Court of Bankruptcy.—In the matter of William Woods, of No. 15, Prospect-place, Wandsworth-road, late of Devonshire-road, Wandsworth-road, Surrey, builder, a bankrupt.

"George John Parsons, of Haslemere, in the county of Surrey, gentleman, solicitor for George Baker, of Hilland, in the parish of Northchapel, in the county of Sussex, gentleman, a creditor of the said bankrupt, who hath duly proved his debt under the fiat in bankruptcy issued against the said William Woods, maketh oath and saith that he was instructed by the said George Baker, upwards of two months since, to oppose the allowance of the said bankrupt's certificate; but not being aware of the necessity for giving notice of such opposition to the registrar of the honourable Court, no notice was given, and that the omission to give such notice arose solely from this deponent's ignorance of the law in that respect, and from no other cause whatever; except such last-mentioned affidavit, no affidavit has been filed in this matter by George Baker, pursuant to the said order; that the bankrupt, feeling aggrieved by the said order, on the 3rd day of January, 1851, presented his petition of appeal to the Right Hon. the Vice-Chancellor, and prayed that the said order might be rescinded, and that his certificate might be granted, and such petition was heard on the 4th of March, 1851, when, after hearing counsel for the bankrupt in support thereof, and for the said Baker in opposition, and counsel for the said assignees also

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appearing, but not opposing the said petition of appeal, his Honour dismissed the said petition with costs."

The bankrupt feeling also aggrieved by the last-mentioned order, and conceiving the same to be erroneous, appealed therefrom to this Court.

The petition prayed that the order of the 4th day of March, 1851, and also the said order of the 21st day of December, 1850, may be discharged, and that the bankrupt's certificate might be granted.

Russell and Willes, for the bankrupt, relied on the 198th section of the Bankrupt Law Consolidation Act.

Swanston, for Baker, *contra*.

Fonblanque, for the assignees.

THE LORD CHANCELLOR, after reading sec. 198, said,—
The construction of this section must be governed by the intention of the statute taken as a whole. My opinion is, that all that is required is that the question of certificate should be heard on some day to be appointed by the Court, of which certain notices are to be given. The Commissioner is to judge as to the most proper day to be appointed; but if on that day it should happen that the question could not be properly brought before the Court, I see nothing in the statute to prevent the Commissioner from appointing a new day, subject only to the provisions as to notice. (a) The Commissioner, from having had the whole case before him from the commencement, is best able to judge as to the necessity of postponing the hearing of the certificate. I cannot, therefore, interfere with the discretion he has exercised. The appeal must be dismissed with costs.

The costs of the assignees were ordered to be paid out of the estate.

(a) His Lordship observed, that, *as required to be given to the Court,*
in the terms of the statute, the notice *and not to the bankrupt.*

1852.

(Before Mr. Commissioner GOULBURN.)

Ex parte FRITH AND SANDS, *re* WOLLASTON.Friday,
Feb. 6th.

THIS was a petition to annul the adjudication, stating that a petition for adjudication of bankruptcy, dated the 21st day of January, 1852, was on the same day filed by John George Lacy and David William Wilton, copartners in trade, against Henry Francis Wollaston (the bankrupt), and that on the 22nd of January, 1852, the said Henry Francis Wollaston was declared a bankrupt;—on the same day an official assignee was appointed. That at the time when the said petition for adjudication was filed, the bankrupt was indebted to the petitioner and his partners in the sum of 16,000*l.* and upwards; and that in respect of the sum 6,060*l.*, part of the last-mentioned sum, they obtained a judgment against the bankrupt in the Court of Exchequer on the 19th of January last, and the Bankrupt was arrested upon a writ of *ca. sa.* on the 20th of January. That on the same day the bankrupt filed a declaration of insolvency, dated at half-past three o'clock in the afternoon, which was the act of bankruptcy. That on the 23rd of January they were served with notice that the bankrupt would, on the 24th of January, apply to the Court of Bankruptcy, London, for an order for his immediate release from prison, in pursuance of the Bankrupt Law Consolidation Act, 1849. That the bankrupt resided and carried on business as a merchant at Cape Town, in the colony of the Cape of Good Hope, from the year 1847 to the month of December, 1849, when he wholly ceased to trade; and that on the 24th of December, in that year, he became an insolvent under the then insolvent law of the Cape of Good Hope, and surrendered his estate and effects to be administered; and that an order of sequestration was made, under which all the present and future estate, moveable and immoveable, per-

Petition to Annul.

Where the adjudication was for the benefit of the bankrupt, and not for distribution of assets, it will be annulled, notwithstanding there is a *bond fide* petitioning creditor's debt. To support the adjudication, it is not sufficient to show that there are assets, if they be not sufficient to make a dividend.

A. carried on trade in a colony, and there became insolvent. His estate was distributed according to the laws there in force, but he never obtained a legal discharge (similar to a certificate). He afterwards came to reside in England, but carried on no trade or business.

Held, he was not a trader within the meaning of the bankrupt laws.

1852.

Ex parte
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sonal and real, and every right, title, and interest in and to any property, personal or real, wheresoever the same might be known or found, which belonged or was due to the said bankrupt at the date of making such order, or which might be thereafter purchased or acquired by, or might descend or be devised or come to, the said Henry Francis Wollaston, at any time before the making of the order of court allowing and confirming the plan of distribution named by his trustee, was vested in the Master of the Supreme Court of the colony, for the purposes of the sequestration. That by an order of the Supreme Court of the colony, dated on the 16th day of January, 1851, a provisional trustee of the estate and effects of the said bankrupt was appointed, and that by a subsequent decree of the Supreme Court confirming the appointment of the trustee, the said estate and effects of the bankrupt were divested from the said Master of the Supreme Court, and vested in the said trustee; and that the bankrupt has not obtained his certificate from his creditors in the Cape of Good Hope under the said insolvent law; and that by the said insolvent law of the Cape of Good Hope, the bankrupt is incapacitated and disqualified from acquiring and possessing, as against the trustee in whom his estate is vested, any property, goods, or effects, or any right to any property, goods, or effects: and that the bankrupt returned from the said colony of the Cape of Good Hope to England in the month of May, 1850, and has not since been engaged in any trade or business whatsoever on his own account or for his own profit. That the said Henry Francis Wollaston has no property, estate, or effects, of any kind or nature whatsoever, in England or elsewhere, to be distributed amongst his creditors under this adjudication. That on or about the 5th of April, 1849, and before the bankrupt became insolvent at the Cape of Good Hope, and when he had considerable property which might have been administered and distributed amongst his creditors under a fiat in bankruptcy, the petitioner and his partners caused a fiat in bankruptcy to be issued against the

said bankrupt, when Lacy (the petitioning creditor) refused to assist the petitioner in carrying out the fiat ; and that the fiat was annulled for want of an act of bankruptcy. And the debt due by the bankrupt to the petitioning creditor, in respect of which the present petition for adjudication is founded, is a debt in respect of which the petitioning creditor has been allowed to prove, and has taken a dividend under the insolvency at the Cape of Good Hope. That the bankrupt was not indebted at the date of the filing of the said petition, nor is he now indebted to the petitioning creditor in any sum sufficient to support the adjudication ; and that the petitioner believed that the said petition for adjudication was filed fraudulently and in collusion with the bankrupt for his benefit only, and for the purpose of defeating the execution of the petitioner, and not for the purpose of distributing any estate amongst the bankrupt's creditors generally, or for any purpose useful or beneficial to them.

The petitioning creditor denied collusion, and declared that neither he nor his partner was aware of the filing of the declaration of insolvency till the following day, when he was informed of it by the bankrupt ; and that then, believing that the bankrupt was possessed of some estate, they filed the petition for adjudication to protect themselves.

The bankrupt admitted the insolvency at the Cape, and that he had not received his certificate, and declared (as the fact is) that he believed the petitioners had proved against his estate under the insolvency, and had received a dividend ; and that he filed his declaration of insolvency without the knowledge or concurrence of the petitioning creditor : that he is possessed of property to the amount of 185*l.* and a life interest under his marriage settlement worth about 200*l.* or 300*l.*, and that there are some book debts still due to his estate ; and that on a former occasion, when examined, he erroneously stated that he had no property in England, he not understanding the questions then put to him.

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Tyrrel, counsel, for petitioning creditor.—The bankrupt was in trade when our debt was incurred ; it is a legal debt, and sufficient to support an adjudication. The dividend received in respect of our proof at the Cape must be taken as part payment. We are in the same position as the petitioners as to the balance ; if our claim is extinguished, the same must be the case as to theirs ; but it has been held otherwise by the Court of Exchequer. The declaration of insolvency was filed without our knowledge ; but when we became aware of it, we were justified in taking measures to protect ourselves. Looking at the proceedings at law taken by the petitioners, it was natural for us to suppose that they were aware of the bankrupt being possessed of some means of satisfying their judgment, and we instructed our solicitor to take steps to enable us to share in any property that the bankrupt might have to be divided ; and the petition for adjudication was filed accordingly, and without regard to the bankrupt's benefit.—By the affidavit of the bankrupt it appears that there are assets. The adjudication would not release the bankrupt from custody of course. This case is distinguishable from *Ex parte Gaitskell*, 3 Dea. 635, which will be relied on by the other side. In that case there was no pretence that there were assets, and there was direct collusion.

Lawrance, solicitor, for bankrupt.—*Ex parte Gaitskell* cannot apply : when that case was decided, any collusion would void a bankruptcy. In the old cases, want of assets was taken as evidence of collusion, but now no adjudication is voidable on account of collusion. It is not incumbent on the petitioning creditor to show that there are assets, nor will the Court look to the extent of the bankrupt's estate.

Bagley, counsel, for petitioner, relied on *Ex parte Brundlett*, 3 M. & Ayr. 50, and *Ex parte Gaitskell*, which was decided subsequent to the stat. 2 Wm. 4, c. 56, s. 42, which

enacted that concert should not void a fiat. The bankrupt's trading ceased by operation of law when he became insolvent at the Cape; and there has been no trading since; so that at the time when the declaration of insolvency was filed, the bankrupt was not a trader within the meaning of the bankrupt laws. (*Ex parte Chambers*, 3 M. & Ayr. 294.) There can be no pretence of assets; all the bankrupt's property is vested in the trustee appointed under the insolvency at the Cape, as if it had been assigned to him by deed, and he can enforce his rights here. The adjudication, therefore, can be for no other purpose than the benefit of the bankrupt. The adjudication must be void. (*Ex parte Lewis*, 1 M. D. & De Gex, 370; *Ex parte Spicer*, 2 M. D. & De Gex, 388.)

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Mr. Commissioner GOULBURN.—I am of opinion that the adjudication ought to be annulled. The bankrupt was insolvent at the Cape, according to the law of that colony, and all his estate became vested, under the sequestration, in the proper officer and trustees: he has not traded since that time. I adopt the principle in *Ex parte Chambers*, that having ceased to trade by operation of law, and not by his own act, he is not a trader within the meaning of the bankrupt law, there being nothing for that law to operate upon. A declaration of insolvency cannot be an act of bankruptcy when filed by a person who is not a trader under the statute. The object of the law as to filing declarations of insolvency is to enable traders to distribute their estates, and to avoid making preferences. The adjudication does not seem to have been for the benefit of creditors, but for releasing the bankrupt. The defence to the action failed, and it was decided that the plaintiffs had still a remedy against the bankrupt's person: that remedy was immediately enforced. The bankrupt, on the last occasion that he was here, stated that he had no property; but after the opinion of the Court was intimated as to assets, he corrects that statement; but he has not shown that there was anything to divide. I do not

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think this subsequent statement entitled to much credit. *Ex parte Gaitskell* is in point. The amount of assets is not to be considered as an objection, as a general rule; but when they are not sufficient to make a dividend, as in the present case, where the debts amount to many thousands, that fact ought to weigh with the Court to show the intention of the petitioner for adjudication. The adjudication must be annulled.

(Before Mr. Commissioner STEVENSON.)

Re PRITCHARD, ex parte KNOWLYS.

Order and dis-
position;
Protected
transaction.

Goods had
been in the
order and dispo-
sition of the
bankrupt, with
the consent of
the owner.

Shortly before
the bankruptcy
applications
were made on
behalf of the
owner, that the
goods might be
given up, but
notwithstand-
ing which, they
still remained
in the order
and disposition
of the bank-
rupt.

On applica-
tion to the
Court by the
owner that the
assignees
might be or-
dered to deliver
up the goods to
the owner:

Held, that

though an act of bankruptcy might have been committed previous to the demand for the goods, the owner, not having had notice, was entitled to the goods.

THIS was an application on the part of a Mrs. Knowlys, as the executrix of the will of her late husband, for an order of this Court directing the assignees of Pritchard to deliver up to her certain machinery, paint materials, and other articles alleged to belong to her husband's estate, but which were on the bankrupt's premises at the time of the filing of the petition for adjudication. The assignees also applied for an order for leave to sell these chattels for the benefit of the creditors, under the 125th section of the Bankrupt Law Consolidation Act, on the ground that these goods were in the possession, order, or disposition of the bankrupt, at the time he became bankrupt, by the consent and permission of the true owner thereof, according to the terms of that section.

The material facts of this case are as follows.—Under an agreement, dated the 17th of September, 1850, it was arranged that the machinery, materials, and other articles in question (which were then on the bankrupt's premises, and had been used by him in the carrying on of certain paint-works as agent to Mr. Knowlys, whose property they then clearly were),

should remain on these premises, and be used by Pritchard in the manufacture by him of certain paints, on his own sole account, for one year, from the 1st of June, 1850. Mr. Knowlys died in October, 1850, and probate of his will was granted to his widow, Mrs. Knowlys, on the 19th of February, 1851. The filing of the petition for adjudication in this bankruptcy was on the 11th of November, 1851. On the 7th of November, 1851, Mr. Clare, a solicitor, acting under instructions from Mrs. Knowlys, called at the bankrupt's premises for the purpose of demanding the possession of the chattels in question, but did not see the bankrupt, he not being there, but saw some clerks, and spoke to one of them, who was represented to him as the book-keeper, and he informed him that he came to demand possession of these chattels on behalf and as the property of Mrs. Knowlys, as her husband's executrix, and was told, in answer, that the bankrupt not being there, they had no authority to deliver them up. Mr. Clare went a second time on the same day, and again asked for the delivery of these chattels, and received the same answer; and went again on the 10th of November, to repeat the demand, but found the place locked up.

Some doubt has been entertained whether an act of bankruptcy was committed by Pritchard prior to the 7th of November, 1851, and consequently, whether the demand on that day for the delivery of these chattels was before or after an act of bankruptcy by Pritchard; but it was admitted that Mrs. Knowlys, or her agent, had no notice of an act of bankruptcy, either before or after such demand.

JUDGMENT.

The first point for consideration is, whether the demand made by Mr. Clare on behalf of Mrs. Knowlys, on the 7th of November, was sufficient to take these chattels out of the possession, order, and disposition of the bankrupt, by the consent and permission of the true owner, according to the 125th section of the Consolidation Act. The case of *Smith*

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v. *Topping*, 5 Barn. & Adol. 678, appears to be a direct authority that such a demand was sufficient for such purpose. In that case there was a similar demand made of the clerk of the bankrupt in his absence, who refused to deliver up the chattels; and again on the same day the bankrupt himself was required to deliver them up, but he also refused to do so. This demand appears to have been made before the act of bankruptcy as well as before the issuing of the commission. It was held to be clear, that after the demand upon the clerk, the goods were no longer in the possession of the bankrupt with the consent of the true owner, and judgment was given in favour of the plaintiff claiming these goods of the assignees. If, therefore, there was no act of bankruptcy prior to the demand made by Mr. Clare, in this instance, on the 7th of November, it would follow that the assignees would have no right to these chattels. But as it is not clear whether an act of bankruptcy was committed by Pritchard before or after the 7th of November, it becomes necessary for me to consider whether, if an act of bankruptcy had been committed before that period, such circumstance would affect the rights of the parties, Mrs. Knowlys or her agent having no notice of any such prior act.

The early authorities on this subject have certainly laid down the position, that the words "at the time he becomes bankrupt," used in the stat. 21 Jac. 1, c. 19, and also in the 6 Geo. 4, c. 16, s. 72, applied to the *act* of bankruptcy, and not to the date of the commission or fiat. But since the stat. 2 & 3 Vict. c. 29, a contrary view of this question has been taken, where the owner had not notice of a prior act of bankruptcy; and the regaining of the possession of the goods before the fiat, although after a secret act of bankruptcy, has been considered to be a transaction protected by the latter statute, the enactment in which, it is to be observed, is adopted in the same terms in the 133rd section of the late Consolidation Act. The cases in which this latter view of the question has been taken, and which have been cited in

the argument on this case, are, first, *Pariente v. Pennell*, 2 Moo. & Rob. 517, where goods had been assigned before an act of bankruptcy, but possession was not taken by the assignee until after such act, but without notice of it, and before the date of the fiat; and it was there held, that the assignee had no right to the goods, the taking possession before the date of the fiat being held to be a transaction protected by the 2 & 3 Vict. The next case referred to is *Ex parte Styant*, decided by Lord Lyndhurst on appeal, and reported in 2 Mont. D. & D. G. 210, in which a life policy had been deposited by the bankrupt before an act of bankruptcy, but notice of the deposit had not been given until after such act, of which act the depositary had no notice; and his lordship held, that the deposit and the notice of it constituted a transaction protected by the 2 & 3 Vict. The other case on the subject is *Young v. Hope*, in 2 Exch. Rep 105, which was very similar to the present. There the bankrupt took possession of goods of another person, under an agreement that he should keep the possession of them for one year, on payment of a certain sum at a certain period, and that in default of such payment, the owner should be at liberty to retake them. Default was made, and the owner, after an act of bankruptcy, of which he had no notice, but before the fiat, re-possessed himself of these goods, and sold them. This was also held to be a transaction within the 2 & 3 Vict. In this case the previous authorities were fully discussed, and amongst them is that of *Fawcett v. Fearne*, 6 Q. B. Rep. 20, which appears to have laid down a contrary doctrine, and to have decided that the 2 & 3 Vict. c. 29, made no difference as to the operation of the provision in the bankrupt laws respecting goods in the reputed ownership of the bankrupt. But it was considered by the judges who decided the case of *Young v. Hope*, that *Fawcett v. Fearne* was not in point, inasmuch as there the goods came into the possession of the bankrupt for the first time after the act of bankruptcy, and before the fiat, and that the 2 & 3 Vict. had no relation

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to such a case, but only rendered valid particular transactions before invalidated by the rule of relation to the act of bankruptcy. This case of *Fawcett v. Fearne*, which appears to be the only one opposed to the construction of the 2 & 3 Vict. before adverted to, being thus distinguished from the other cases cited, and at all events having been considered not to militate against them, these authorities must, I think, be viewed as decisive upon the subject, particularly that of *Young v. Hope*, which appears to me to remove all ground there might have been for contending that the cases of *Pariente v. Pennell* and *Ex parte Styan* were not in point, on the ground that the respective acts of taking possession of the goods and giving notice of the deposit of the policy were only acts done for perfecting the assignment and deposit respectively made before an act of bankruptcy, and therefore formed part of the respective transactions which occurred before any such act. But in this case of *Young v. Hope*, the taking possession after the act of bankruptcy was a transaction distinct from and independent of the delivery of possession made before that act, and was alone treated as a transaction within the 2 & 3 Vict.

Upon these authorities, therefore, and taking into consideration that the intention of the Legislature latterly has been to diminish the severe effect of the relation to the act of bankruptcy, and to extend the protection given to *bonâ fide* transactions with traders, I think that the demand in this instance of the chattels on behalf of Mrs. Knowlys, which, as I have before shown, was tantamount, under the circumstances, to the actual taking possession of them, must be held to be a transaction protected by the 133rd section of the Consolidation Act, although such demand may have been made after an act of bankruptcy; and that, consequently, the assignees have no claim to these chattels, but must deliver them up to Mrs. Knowlys, as her late husband's legal personal representative.

1852.

(Before Mr. Commissioner FANE.)

Re MAY, *ex parte* HAWLEY.*Friday,*
Nov. 14.

THIS case was brought under the consideration of the Court under the following circumstances :—

The bankrupt, May, had a leasehold interest in certain premises situate at Newington, Surrey, the title-deeds relating to which were at the time of the bankruptcy in the possession of May's (the bankrupt's) solicitor, who claimed to have a lien on the deeds in respect of his general bill of costs against the bankrupt, and also as equitable mortgagee in respect of his having indorsed certain bills of exchange as surety for the account of the bankrupt. The validity of this claim being disputed by the assignees, it was arranged that the bankrupt's interest in the property should be sold, and that the produce received by the official assignee to be held subject to the solicitor's claim; and that the claim should be disposed of by the commissioner, under the 12 & 13 Vict. c. 106, s. 12.

Fooks, counsel, for the claimant Hawley, relied upon an affidavit made by the claimant, in which he stated that he had acted as solicitor for the bankrupt, and that the deeds in question had come into his hands in the course of such employment; and that a sum of 48*l.* was due to him for his professional services rendered to the bankrupt; and that he had, for the accommodation and at the request of the bankrupt, indorsed bills for him to the amount of 250*l.*, which had been given by way of security for money lent to the bankrupt, the bankrupt having agreed that the solicitor should hold and have an equitable lien on the deeds in question, in order to indemnify him against his liability on the bills.

Attorney's
lien; Equitable
mortgagee
costs.

An attorney holding deeds of a bankrupt in his custody, at the date of the adjudication, has a general lien thereon for professional services.

A bankrupt's attorney holding title deeds of the bankrupt without any written memorandum cannot sustain a claim as equitable mortgagee in respect of such deeds against the oath of the bankrupt.

Solicitor claims lien for costs, and failing to sustain his case as equitable mortgagee entitled to costs of proceedings to substantiate his claim without apportionment.

Bagley, counsel, for the assignees, admitting that an attor-

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ney's lien for professional services could not be successfully disputed, contended that an attorney has not a lien for debts due *aliunde*, as for money lent (*Worrell v. Johnson*, 2 Jac. & Walk. 218); and that the solicitor's lien in this case should be confined to charges purely professional; and also contended that his claim to stand as equitable mortgagee was answered by a previous examination of the bankrupt appearing on the file of the proceedings under the petition, wherein the bankrupt had stated that the deeds were in the possession of his solicitor as such simply; and distinctly stated that no arrangement or understanding was ever come to between him and the solicitor in question, that the deeds should be held by the solicitor as security against any claim he might have against the bankrupt, or that the solicitor had any lien on the deeds; and contended that, there being conflicting testimony, and there being no other memorandum conferring a lien upon the solicitor as equitable mortgagee, the bankrupt should prevail. (*Ex parte Martin*, 2 Mon. & Ayr. 243; 4 Deac. & C. 457.)

Fooks, in reply.—An equitable mortgage may be created by a deposit of deeds and verbal agreement. The examination of the bankrupt should not be allowed to prevail against the deposition of Hawley, on the ground of the examination of the bankrupt having been *ex parte*, so far as the solicitor was concerned, the same having been taken in his absence, and consequently without his having had the opportunity of cross-examining the bankrupt; and the adjournment was asked on the part of the solicitor for the purpose of procuring the attendance of the bankrupt and his cross-examination.

Mr. Commissioner FANE.—No sufficient grounds are shown for any adjournment. The affidavit of Mr. Hawley is as much an *ex parte* proceeding as that of the bankrupt, as regards this matter. These statements, as to the circumstances under which the deeds in question were held by Hawley, are

difficult to reconcile ; and I should have felt great difficulty in determining which statement is most entitled to credit, if I considered myself called upon to do so. The principle laid down by Sir George Rose, in the case to which I have been referred by Mr. Bagley, has my concurrence, and I shall act upon it in this case. The deposit of deeds is an equivocal act, and if the party with whom they are deposited will not take the ordinary precaution of getting a few lines, signed by the party depositing, stating upon what terms the deposit is made, he places himself at the mercy of the bankrupt ; and if the bankrupt swears the deeds were not deposited as security, the Court ought not to give effect to a contradictory statement on the part of the claimant. If this principle is applicable in any case, it is especially so where the party claiming to hold as equitable mortgagee, was himself the solicitor of the bankrupt, and admits that he became possessed of the deeds in the first instance as solicitor. The solicitor in this case may have the amount of his bill for professional business done for the bankrupt out of the proceeds of the sale of the property to which the deeds relate ; but I disallow his claim as equitable mortgagee in other respects.

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Fooks asked for the costs of the proceedings taken on the part of the solicitor for establishing his claims.

Bagley, contra, on the ground that the claim had failed to some extent.

Mr. Commissioner FANE.—It is not merely by reason of the claimant having asked for more than he has been able to establish, that he should not have his costs, and the costs not appearing to have been increased in any material degree by bringing forward that portion of his claim, on which he has failed. I shall allow him his costs generally.

Order accordingly.

1852.

Re
 MAY,
ex parte
 HAWLEY.
Wednesday,
Dec. 3rd.

Mr. Commissioner FONBLANQUE.—Where a creditor has proceeded simultaneously at law by issuing a writ, and in bankruptcy by a trading debtor's summons, and the debtor had immediately paid the debt and costs at law, the Commissioner refused to make any order as to costs in bankruptcy.

(Before Mr. Commissioner ELLISON.)

Tuesday,
Dec. 9th.

Re ATKINSON.

Order for sale of goods on disposition of bankrupt; Jurisdiction.

A person claiming to be owner for saleable consideration of property, in the order or disposition of the bankrupt, under sect. 125, and having seized it after the act of bankruptcy, and before the petition, if he has notice of the act of bankruptcy, does not thereby obtain the protection of the 133rd section, and deprive this Court of the power to order it to be sold for the benefit of the estate. *Contrà*, if he has such notice.

Although such goods are already sold by the assignees, there is property for the order to operate upon, and such sale is no objection to the Court making the order.

Circumstances under which the Court will make such an order.

THE facts of the case, to which litigation has given some celebrity, may be shortly stated. Atkinson kept the Charles the Twelfth inn, at the Bridge-end, Newcastle. On the 30th of August, 1850, he committed an act of bankruptcy, by departing from his dwelling; and on the 9th of September following, a petition for adjudication was filed, on which he was duly adjudged bankrupt. In the mean time, and on the 3rd of that month, Mr. Heslop, a spirit-merchant at Darlington, to whom the bankrupt had some years before granted mortgages, with power of sale of the stock, furniture, and effects he then possessed, but of which he had nevertheless allowed the bankrupt thenceforth to continue in possession, hearing that Atkinson had absconded, came to Newcastle, and put a man in possession of his stock, fixtures, and effects. Mr. Heslop did not sell any part of the property, and on Atkinson being declared bankrupt, the messenger displaced the adverse possessor, and the assignees of their own authority sold the whole of the effects by private contract, and paid the proceeds into the Court of Bankruptcy, where they remain. An action of trover was thereupon brought against the assignees by Mr. Heslop, which was tried at the last Spring Assizes at Newcastle, before Cresswell, J., when the jury found that the goods in question were in the reputed ownership of the bank-

rupt at the time of his bankruptcy, with consent and permission of the plaintiff, and a verdict was found for the defendants, the assignees, accordingly. The plaintiff's counsel, Mr. Bliss, then objected that the Bankrupt Law Consolidation Act, 1849, sec. 125, had rendered necessary an order of the Commissioner to authorize assignees to sell property so circumstanced, and this objection being reserved by the learned judge, came to be argued before the Court of Exchequer in June last, on a motion for a new trial. That Court held the objection good, and awarded a new trial accordingly. The assignees were thereupon advised that they should apply to the learned Commissioner for an order under the 125th section, as if the sale yet remained to be made, and that such order, if obtained, would, by relation, give a valid title. The application for that order was heard on the 29th of October last, when the plaintiff and witnesses were examined, and his solicitor then objected that such order should not be made, for three reasons, which (stated shortly) were—first, that as the goods had been already sold, there was no property for the order to operate upon, and that the fact of the sale having been made was a reason why this Court should not now make the order; secondly, that even if this Court ought to make the order in any case after the sale of the property intended to be affected by it, no such order should be made in this case, inasmuch as the seizure by Mr. Heslop was a transaction within the meaning of the 133rd section of the Bankruptcy Act, which section related to transactions not affected by bankruptcy, and rendered valid executions levied by seizure and sale before the petition, notwithstanding a prior act of bankruptcy, provided the creditor had not, at the time of levying or making sale, notice of a prior act of bankruptcy; and thirdly, that, supposing those objections to be overruled, the Court should not, under the circumstances of this case, exercise its discretion to make the order prayed.

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Re
ATKINSON.

Mr. Commissioner ELLISON took time to consider his judg-

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ment, the point being new and important, and caused witnesses to be examined to-day on the question whether Mr. Heslop had notice of the act of bankruptcy when he entered; and now proceeded to give an elaborate judgment, in which (after recapitulating the facts, and the matters objected, as already stated) his Honour, taking the second objection first, traced the doctrine from the earliest statute to the present time, showing the gradual relaxation of the severity of that doctrine in favour of persons dealing with the bankrupt, and the final substitution of the time of the fiat for that of the act of bankruptcy. His Honour then took a like review of the parallel provisions made by the statutes relating to property in the reputed ownership of the bankrupt, and pointed out the preservation by the Legislature of the provisions relating to property so circumstanced, through all the statutes relating to the law of bankruptcy, from the 13 Eliz. down to the Act of 1849, without modification. The learned Commissioner then reviewed the reported decisions as to the circumstances under which the property of another, of which he left the bankrupt in possession and reputed ownership, had been held to pass to the creditors generally, and pointed out the distinction which appeared to him to exist between the two sets of provisions—between the property and transactions contemplated by the 133rd section, which related to the property of the bankrupt only, and the property of which the real owner had unconsciously, as the law supposed, allowed the bankrupt to remain in possession. He then noticed the cases decided before the Consolidation Act, which showed that there was no alteration of property in goods by seizure only; that seizure and sale were necessary to give an execution creditor a property in the bankrupt's goods, and said, that even if the protection of the 133rd section could have been effectually claimed in the case of property liable to the doctrine of reputed ownership, Mr. Heslop could not claim it at law, for his alleged title had not acquired the support of sale as well as seizure, and his entry was clearly to the mind of him (the Commissioner), as it had

been to that of the jury, with notice of the act of bankruptcy. His Honour then said that, in the absence of express authority to the contrary, he should have had no hesitation now in deciding that the seizure and even sale by the person claiming to be true owner of a bankrupt's property, in his reputed ownership, could not deprive the Court of Bankruptcy of the power to order it to be sold. But the case of *Ex parte Styán*, 1 Phill. 105, and the case of *Pariente v. Pennell*, 2 Moo. & Rob. 517, in which the doctrine laid down by the Lord Chancellor Lyndhurst in the former case had been followed by Lord Chief Justice Tindal, had struck him, while considering the present application, as authorities for the proposition that a person claiming to be real owner for valuable consideration of property, within the meaning of sec. 125, might, by an act done after the act of bankruptcy and before the petition, deprive this Court of the power to order it to be sold for the creditors; or, in other words, might obtain the protection of the 133rd section, provided he had not notice of the act of bankruptcy. The decision in *Re Styán*, if that be the effect of it, would, of course be binding on this Court; and it had, therefore, appeared to him necessary that he should have evidence on the point of notice; the result of that evidence was to satisfy him that Mr. Heslop had notice of the act of bankruptcy when he entered on the 3rd of September. His Honour then proceeded to advert to the first objection which had been urged by Mr. Heslop's solicitor, and said his decided opinion was, that he was bound to make the order notwithstanding the sale of the goods by the assignees; and, as to the third objection, without deciding whether he had a discretion to exercise his power to make the order or not, he was satisfied that he was now dealing with precisely the case to which the doctrine of reputed ownership had been always held applicable—it was a case within the very words of the early statute of the 11th James, that of an owner who had allowed the bankrupt to remain in possession of his property as reputed owner, and to obtain credit on the

1852

Re
 ATKINSON.

1852. faith of it. For these reasons he was bound to overrule the objections which had been submitted to him, and to make the order now prayed by the assignees.

Re
ATKINSON.

(Before Mr. Commissioner EVANS.)

Re BUCKLAND.

Tuesday,
Jan. 20th.

Certificate.
Sec. 201.

On certificate, dealing in foreign stock and railway shares held not to be within sec. 201 of the Bankrupt Law Consolidation Act, but such dealing held to be reckless trading under the circumstances. Certificate suspended.

THIS was an application by the bankrupt for a certificate, which was opposed on the grounds that the case came within the 201st section of 13 & 14 Vict. c. 106 (Bankrupt Law Consolidation Act), and also that he was guilty of reckless trading.

Lawrance, solicitor, for bankrupt.—(*Wells v. Parker*, 3 Scott, 141; *Oakley v. Ryley*, ib. 194; *Elsworth v. Cole*, 2 Mee. & Wels. 31; *Robson v. Fellows*, 2 Bing. N.C. 332.)

JUDGMENT.

In support of the first section it was admitted by the bankrupt that he had lost within a year before his bankruptcy more than 200*l.* in contracts for the purchase of Peruvian bonds, and also more than 200*l.* in the purchase of railway shares, and that such contracts were not to be performed within one week after the contract, and that the stock and shares were not actually transferred or delivered in pursuance of such contract. It was contended, on behalf of the bankrupt, that the Peruvian bonds, being foreign stock, were not within the word "stock" in the clause referred to, and many cases were cited proving that, under the 7 Geo. 2, c. 8, similar words were held not to include foreign stock. I have looked at those cases, and they establish that point. I had considerable doubt as to whether the 201st section could be considered as similar to the 7 Geo. 2, c. 8; 13 & 14 Vict. c. 106, s. 201. "That no bankrupt shall be entitled to a certificate of conformity under this Act; and any such certificate, if allowed, should be void if such bankrupt shall have lost by any sort of gaming or wagering in one day twenty pounds, or within one year next preceding the issuing of the

fiat or filing of the petition for adjudication of bankruptcy 200*l.*; or if he shall within one year next preceding the issuing of the fiat, or the filing of such petition, have lost 200*l.* by any contract for the purchase or sale of any government or other stock where such contract was not to be performed within one week after the contract, or where the stock bought or sold was not actually transferred or delivered in pursuance of such contract." In stat. 7 Geo. 2, c. 8, the words are "*public or joint stock, or other public securities whatsoever*;" but I find that the opinion of the majority of the commissioners is in favour of such construction; and as the clause is highly penal, I think I ought to decide in favour of the bankrupt on this point. I understand that shares are not considered as stock at the Stock Exchange, and consequently they do not come within the 201st clause. But although I decide that the case does not come within the 201st clause, I am of opinion that the bankrupt has been guilty of reckless trading; that he has traded to the extent of thousands when he had no capital to meet losses. To trade when a man's creditors must necessarily bear the loss and he keep the gains, is most unjust: the frequency of such conduct is no excuse, but proves the necessity of visiting it with severity when proved. I, therefore, shall suspend the bankrupt's certificate for one year; to be of the second class. (a)

No fraud.—Protection.

1852.

Re
BUCKLAND.

(Before Mr. Commissioner AYRTON.)

1851.

ANONYMOUS.

Tuesday,
Oct. 21st.

THIS was a trader debtor summons. The defendant was a coal-owner, selling his own coals.

Bond, for the defendant, contended the summons must be

(a) But see *Ex parte Matheson*, 1 De Gex. & M'N. 48.

Under a trader debtor summons (78 & following sections of 12 & 13 Vict. c. 106), the Commissioners can in-

quire whether the person summoned is a "trader" subject to bankruptcy.

A coal-owner is not such a trader.

1851.
 ———
 ANONYMOUS.

dismissed, the defendant not being a trader subject to the Bankrupt Laws. (*Port v. Turton*, 2 Wils. 168. And see *Ex parte Gardener*, 1 Rose, 377; *Ex parte Burgess*, 2 Gl. & J. 183; *Ex parte Atkinson*, 1 M. D. & D. 300.) And the Commissioner can entertain the question whether the person summoned is such trader. (See *Bryan v. Child*, 5 Ex. 368.)

Blackburn, contra.—This objection can only be taken if an attempt is made to declare the defendant a bankrupt.

Mr. Commissioner AYRTON.—In this case there are two points: first, have I a power to inquire whether or not this defendant is a trader subject to the Bankrupt Laws? and if I have, then, secondly, is he such a trader? As to the first point, sec. 78 enacts, that if any creditor of *any such trader* shall file, &c., the Court may issue a summons and proceed thereon. “Such trader” means a trader subject to the Bankrupt Laws, and if the defendant is not so subject, I have no jurisdiction. Before, therefore, I take any further step, I ought to ascertain that the defendant is within my jurisdiction, otherwise the proceedings would be *coram non judice*. This brings me to the second question, which is, whether the defendant is a “trader.” No affidavits are filed, the facts being admitted. The fact, then, is, that the defendant is a coal-owner, that is, a gentleman who works his own coal-mine, and sells the coal; one, therefore, who does not both buy and sell coal; one who did both would be a coal-merchant, not a coal-owner. Under the old law, great doubts, to say the least of it, existed as to whether coal-owners, lime-burners, alum-makers, and brick-makers were traders, subject to the Bankrupt Laws: the present statute expressly declares all of them to be traders, except coal-owners, as to which the statute is silent; which is an argument against their being traders. The general words, “by workmanship of goods and commodities,” would more strongly have applied to a brick-

maker, who digs up clay, but sells a manufactured article,—bricks; still more to an alum-maker, who takes up aluminous clay or slate, and sells a crystallized manufactured substance called alum; yet these instances were not within those general words, or they would not have been inserted by name: clearly, then, a coal-owner is not within those general words, as all he does is to dig up and bring up to the surface his own coals, and sell them.

1851.

ANONYMOUS.

This summons therefore must be dismissed.

Re WILSON.

*Monday,
Nov. 17th.*

CARISS, for the bankrupt, moved that the proceedings after adjudication be set aside, in consequence of no duplicate of such adjudication having been served upon the bankrupt, as required by sec. 104 of 12 & 13 Vict. c. 106, which enacts, “that before a notice of any adjudication in bankruptcy shall be given in the *London Gazette* * * * * a duplicate of such adjudication shall be served on the person adjudged bankrupt.” Now, in what is called the duplicate, said to be served on the bankrupt, there is a blank where there ought to be the month “October,” and the figure “1” is omitted in the year “1851.” Then the name of the solicitor is erroneously written on the back of the duplicate.

Clerical errors and omissions in the duplicate adjudication served on the bankrupt do not render the proceedings after adjudication null and void.

Ford, for the petition, *contrà*.

Mr. Commissioner AYRTON.—The copy of the adjudication served is defective, as Mr. Cariss states; therefore it is not, in fact, a duplicate. But the object of sec. 104 is, that the bankrupt may have full notice of the adjudication, in order that he may, if expedient, appear within seven days, and dispute such adjudication. In this case, the bankrupt does not wish to dispute the adjudication, but contends that all

1851.

Re
WILSON.

done since is null and void. If, indeed, the bankrupt had held himself aloof from the Court, and when written to by the official assignee, had answered, "What do you mean by writing to me? I know nothing about what you allude to," he might have placed the petitioning creditor in a difficulty. But the bankrupt now appears by his solicitor in court, and thereby admits that he very well knows what is going on; and he has not taken, nor does he now take, any objection to the adjudication itself. I do not think the omission of "October" and "1" fatal to all subsequent proceedings, so as to render them absolutely null and void; and in point of equity, no injury has been done, nor will any accrue to the bankrupt by these clerical slips: the object of the clause is satisfied; the bankrupt has had notice of the adjudication, which he does not dispute, and his appearance here this day cures the blot. I therefore do not perceive any reason for my interfering to stay proceedings.

Monday,
Dec. 1st.

ANONYMOUS.

A petition under sec. 211 of the Bankrupt Act will not necessarily be dismissed, because part of the assets consists of mortgaged property.

THIS was the first private sitting under the private arrangement clauses of the Bankrupt Act (sec. 211 and following clauses). The debtor filed a balance-sheet, setting forth his property to consist of:—

	£.	s.	d.
Household furniture	58	0	0
Stock in trade and fixtures	68	0	0
Two houses upon which the			
Equitable Building Com-	£.	s.	d.
pany have a claim for ...	614	0	0
Cost value	750	0	0
<hr/>			
Present value.....	136	0	0
<hr/>			
Assets	262	0	0
<hr/>			
Debts accruing	486	0	0

Barwick, for a creditor who objected to the arrangement, contended the petition must be dismissed, as the affidavit (schedule B, 6) deposes, “this deponent hath assets *ready to be produced* to this honourable Court, to the value of 200*l.* and upwards;” but part of this consists of mortgaged property, which is not “assets ready to be produced,” it having been decided by the Commissioners that book-debts are not such assets, nor a reversionary interest.(a)

1851.

ANONYMOUS.

Mr. Commissioner AYRTON.—I see no reason to charge the petitioner with bad faith. Do you contend that this affidavit is “wilfully” untrue under sec. 223?

Barwick.—I do not so contend, but I say that the foundation for the whole proceeding fails, in like manner as if under a bankruptcy the debt of the petitioning creditor is defective. I contend that this petition ought to be dismissed.

Mr. Commissioner AYRTON.—In the cases cited, the petitioners were adjudged bankrupts under sec. 223, no doubt, because “the affidavit filed with the petition was wilfully untrue, so far as concerned the assets ready to be produced by him.” In the present case, it is not contended that the affidavit is “*wilfully*” untrue, nor do I see any reason to suppose that it is so: this case, therefore, is not within the principle of those cited. Mr. Barwick, indeed, does not ask that the petitioner be “adjudged bankrupt,” but he asks that I should dismiss the petition; but the early portion of sec. 223 points out three cases in which the petition is to be dismissed, and the error of the petitioner in describing his property in this case is not one of them. I therefore think I ought not to dismiss the petition, but leave the matter in the hands of the creditors now assembled, to approve, or not, as they think fit, of the proposition made to them by the petitioner: if that proposition be not assented to, then by this 223rd section, I am directed to declare the petitioner a bankrupt.

(a) *Anon. sup. p. 15.*

1851.

Tuesday,
Dec. 2nd.

ANONYMOUS.

The Court of
Bankruptcy
can rehear an
application under
a trader
debtor summons.

A TRADER debtor summons issued under sec. 78 of the Bankrupt Act ; it was served on the 15th of November ; on the 25th, the defendant appeared, and filed an affidavit of a good defence ; the plaintiff asked for a bond, but after hearing the evidence of the defendant on oath, that was refused. On the 27th of November, the plaintiff filed an affidavit showing that the defendant had sworn falsely, whereon the Commissioner allowed notice for a rehearing to be given for this day.

Cariss, for the defendant, contended that the Commissioner having made an order, his power was gone ; and even if the matter could be reheard, yet no bond could be ordered, as sec. 79 says, the Commissioner may “ at the same time,” that is, the day of hearing, direct a bond to be given.

Bond, for the plaintiff, contended in favour of the Court of Bankruptcy possessing the same power to rehear a case as all Courts, and he cited *Ex parte Lancaster Canal Company*, 1 Dea. & Ch.

Mr. Commissioner AYRTON.—Though sec. 79 uses the words “ the same time,” yet sec. 80 refers to “ any enlargement thereof,” and sec. 83 expressly enables the Court to enlarge the time ; and the whole of the sections under the head of “ Acts of Bankruptcy by nonpayment after summons ” are to be read together.

As to the power to rehear. By sec. 6, the Court of Bankruptcy is a court of law and equity—a court of record—and has all the powers, rights, incidents, and privileges of a court of record, as fully, to all intents and purposes, as the same are used and enjoyed by any of her Majesty’s courts of

law or judges at Westminster. By sec. 12, the Court, in the exercise of its primary jurisdiction, shall have superintendence and control * * * * in any other matter (whether in bankruptcy or not) where the court, by virtue of this Act, has jurisdiction over the subject of the * * * * application.

1851.

ANONYMOUS.

Now, it is a right inherent in all courts to rehear a matter: in courts of law this is called a new trial; in courts of equity, a rehearing. The Court of Bankruptcy is a court of law and equity. Sec. 207 assists in proving that this Court has a general power to rehear, for that section enacts that the decision of the Court touching the certificate shall be final and conclusive, "and shall not be reviewed by the Court," except under certain circumstances: this restrictive clause proves, that, in the absence of the restriction, decisions touching the certificate could have been reviewed on any ground.

In this case, the evidence on the 25th of November was all on one side, so that it would be in vain to appeal; the consequence of which is, that unless I can rehear the matter, the plaintiff will be deprived of his remedy, though he alleges fraud and perjury on the other side. Not to rehear, therefore, would be to run counter to the maxim, *boni judicis est ampliari jurisdictionem*, which Mr. Broom properly translates, it is the duty of a judge, *when requisite*, to extend the limits of his jurisdiction. "The maxim of the English law," says Lord Abinger, in *Russell v. Smith*, 9 M. & W. 818, "is to amplify its remedies, and without usurping jurisdiction, to apply its rules to the advancement of substantial justice."

I therefore am of opinion that I have power to rehear this case, and that the affidavit filed on the 27th furnishes a *primâ facie* case for rehearing. I therefore shall rehear the case.

Some evidence was then given by the plaintiff's witnesses, when *Cariss* interposed, and admitted his client could not resist giving a bond.

1851.

ANONYMOUS.

Whereupon the former order was discharged, and an order made to enlarge the time for seven days, to enable the defendant to enter into a bond, which he was ordered to do.

Wednesday,
Dec. 17th.

Re ASHTON.

Goods sent on sale and return, not actually delivered at the time of bankruptcy, are not in the reputed ownership of the bankrupt.

MESSRS. APPERLY sent certain pieces of cloth to the bankrupt, on sale or return, accompanied by a letter and invoice, both of which were received by the bankrupt before the adjudication: the cloths did not arrive at the railway station at Hull till after the adjudication. The messenger seized the goods at the railway station at Hull. Messrs. Apperly applied to the Commissioner to order the cloth to be delivered to them, which was resisted by the assignees, on the ground that the delivery at the railway was delivery to the bankrupt, and the cloths were consequently in the reputed ownership of the bankrupt. The Commissioner took time to consider his judgment, which was now delivered.

Mr. Commissioner AYRTON.—The statutory enactment now in force is to be found in the 125th section of the Bankrupt Act of 1849. It is to be noticed, that the statute of James 1 used the word “and”—“in his possession, order, and disposition;” whereas sec. 125 has the word “or,”—“in his possession, order, or disposition”—which considerably enlarges the operation of the law of reputed ownership.

In the present case, the goods in question were not within that portion of the clause which speaks of the bankrupt as being the “reputed owner,” for no one ever saw the goods in his possession; nor had he “taken upon him the sole order or disposition.” All that remains to consider is, whether he had, at the time he became bankrupt, these goods in his possession, or in his order, or at his disposition.

Messrs. Apperly contend that these goods were not, in fact, ever delivered to the bankrupt, or to his agent, the car-

riers, the Railway Company ; it has not been clearly ascertained on what days the goods arrived at and left Birmingham, to which place Messrs. Apperly paid the carriage, and from which place the bankrupt was to pay the carriage ; but I intend to decide this question on the broad ground of whether these goods, sent on sale or return, and not accepted by the bankrupt, are within the law of reputed ownership.

Upon looking into the reported cases, I find three decisions applicable to the particular question of goods sent on sale or return. The first case is *Neate v. Ball*, 2 East, 117 ; there, bags of wool were sent on sale or return, on the 19th of February, and kept by the bankrupt till the 5th of March, when, finding himself insolvent, he, for that reason, returned the wools, which were held by Lord Kenyon to be in the reputed ownership ; his Lordship observing, “ The jury were told by me that if the goods were not delivered to and accepted by the bankrupt, there was an end of the question, and the property remained in the hands of the consignors ; but if otherwise, the bankrupt had no power to rescind the contract when he returned them.” The next case is *Livesay v. Hood*, Camp. N. P. 83. The marginal note of the case is, that goods in the hands of a retail dealer, on sale or return, are in the reputed ownership : the facts, however, are of too peculiar a nature to establish that general proposition. Livesay, a wholesale hosier, agreed to furnish Almond, a retail hosier, with goods on sale or return ; Almond was constantly to have a stock of hosiery from Livesay, to the value of 100*l.*, which he was to sell, and the parties were to come to an account monthly. Almond became bankrupt, the assignees seized goods supplied under this agreement worth 61*l.* ; then Livesay brought an action to recover the goods, but was nonsuited, Mr. Justice Lawrence saying, “ This is a case within the statute ; under this agreement, the bankrupt was to sell the goods, not as a factor, but as a principal ; they appeared as his property ; and this reputed ownership was calculated to give him a delusive credit, which was the object of the sta-

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tute to prevent." The third and last case is that of *Gibson v. Bray*, 8 Taunt. 76. Shawls and laces were sent by Morgan, of London, to Markham, of Sunderland, accompanied by a letter hoping that some of the articles would be approved of, and desiring to have those articles which were not approved of returned as soon as possible : on the evening of the day of the arrival of the goods at Sunderland, the effects of Markham were seized under a *fi. fa.* and on the following morning, the sheriff shut up the shop, which was not ever reopened. An action was brought for these goods by Morgan against the assignees of Markham, who had become bankrupt. At the trial before Chief Justice Gibbs (1 Holt, N.P. Cases, 556), his Lordship directed a verdict for the plaintiff, on the ground that the goods were in the reputed ownership ; afterwards, however, a new trial was moved for, and ordered (8 Taunt. 76), the Court being of opinion that the goods were not in the order and disposition of the bankrupt. Mr. Justice Dallas said, " The bankrupt had not had a reasonable time wherein to judge what he would or would not take." Mr. Justice Parke said, " We impugn not the cases of *Neate v. Ball*, and *Livesay v. Hood*. Markham had never any opportunity of exercising the discretion delegated to him, as to the selection of what goods he should keep, or what he should return ;"—" there is no pretence for saying that a delusive credit could be raised. In *Neate v. Ball*, the bankrupt kept the goods from the 19th of February to the 4th or 5th of March ; in *Livesay v. Hood*, the goods had been in possession of the bankrupt for nearly a month ;" and Mr. Justice Burrough observes, " The key to this case lies in the postscript to the letter,—' shall be very much obliged to have them returned, what is not approved, as speedily as you can.' It is quite plain that Markham was to have a reasonable time to choose whether he would have all the goods or a part of them only ; he had not a reasonable time in which to exercise his power of choice, nor did he exercise any power over these goods."

The case of *Gibson v. Bray* is quite a precedent to govern the present ; I may use almost the very words of Mr. Justice Burrough. The key to this case is that the bankrupt was to be allowed a reasonable time to choose whether he would take all the cloth, or select only a portion, or reject the whole ; he never had any opportunity of exercising this power, and he never accepted the whole, nor any part of the cloth ; he never did exercise any sort of control over the cloth, and there is no pretence for saying that any delusive credit was raised.

I am, therefore, of opinion that the cloth in question was not in the reputed ownership of the bankrupt, and must be delivered up to Messrs. Apperly.

1851.

Re
ASHTON.

Ex parte LUXFORD, re LUXFORD.

THIS was a petition by the bankrupt to annul the adjudication with the consent of all the creditors who had proved. The bankrupt had not passed his last examination.

Bond, for the petition, stated that this petitioner could pay perhaps sixty shillings for every pound he owed, and knowing that, neglected a trader debtor summons, and so committed an act of bankruptcy.

1852.

Monday,
March 8th.

There is no jurisdiction to annul with consent of creditors, save under sec. 230 ; but if every creditor consents, such order will be made at the risk of the petitioner.

Mr. Commissioner AYRTON.—Till very lately, there existed an opinion that the Commissioners had jurisdiction on all occasions in which the Court of Review would have had jurisdiction ; but having regard to the case of *Ex parte Carter, re Dimmock*, where the Lord Chancellor decided that after the seven or fourteen days mentioned in sec. 104 have elapsed, the Commissioner has no power to annul adversely on the bankrupt's application, it appears to me that the power of the Commissioners, as to annulling, is restricted and less extensive than that formerly possessed by the Court of Review ; and I think that the power of the Commissioner, on the bankrupt's application, is now confined to cases which

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Ex parte
LUXFORD,
re
LUXFORD.

fall within clause 104 or clause 230, and, therefore, that I have no power to annul in this case till after the bankrupt shall have passed his last examination, when he can proceed under sec. 230.

Bond afterwards produced an affidavit that the creditors who had consented to the bankrupt's petition to annul were his only creditors at the date of filing the petition, and that he was not indebted to any other person whatever.

Mr. Commissioner AYRTON.—I may now safely order the adjudication to be annulled and the petition dismissed, because, though I have not, in strictness, jurisdiction to make such an order, yet, if the bankrupt and every one of his creditors consent to the order, it can never come into question or be disputed.

Adjudication annulled and petition dismissed.

Thursday,
April 8th.

Ex parte HARRIS, *re* HARRIS.

Semble.—The Court of Bankruptcy has no jurisdiction to annul with consent of creditors, save under secs. 130, 131.

Where the bankrupt may have to be prosecuted for offences under the bankrupt law, the Court will not so annul, even if there be jurisdiction.

THIS was a petition to annul the adjudication with the consent of all the creditors, including the assignees.

Shackles, for the bankrupt.—The Court has power to annul the adjudication, as was formerly done, with the consent of all the creditors who had proved or claimed. In this case, in deference to the opinion of the Court, much more has been done, as the consent of 147 creditors has been procured; in fact, every creditor but three has signed, two of which creditors are corporations, but the corporate seal has not been affixed; and the third, a creditor for 12s. 6d. is abroad, and owes the estate 5l. He cited and commented upon 6 Geo. 4, c. 16; 1 & 2 Wm. 4, c. 56; 10 & 11 Vict. c. 102; 12 & 13 Vict. c. 106, ss. 12, 104, 230, and 231; Lord

Eldon's Order, 1818 ; *Ex parte Duckworth*, 16 Ves. 416 ;
Re Chambers, 4 Dea. & Ch. 578 ; *Ex parte Carter*, 8 Nov.
 1852 ; (a) *Ex parte Kimbell*, 1 Mont. & De Gex, 138.

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Mr. Commissioner AYRTON.—In this case I am asked to order the adjudication to be annulled, such order being consented to by the creditors.

Formerly, the Lord Chancellor who issued the commission of bankruptcy possessed, under his general assumed jurisdiction, an almost absolute control over it, so far as regarded superseding it afterwards ; and this power, under the designation of annulling the fiat, was afterwards exercised by the Lord Chancellor, after the institution of the Court of Review ; for though the Court of Review, and afterwards the Vice-Chancellor, were constantly in the habit of ordering the fiats issued by the Lord Chancellor to be annulled, yet these orders were invariably accompanied by the words, “ if the Lord Chancellor thinks fit ; ” and the fiat was not annulled till the Lord Chancellor's confirmation of the order was procured.

It is not doubted that formerly there existed a method by which a commission could be superseded, or a fiat annulled, at any time, with consent of all the creditors who had proved or claimed under the bankruptcy ; my doubt is, whether the Commissioners of the Court of Bankruptcy possess any such general jurisdiction.

When the Bankrupt Law Consolidation Act passed, in 1849, all jurisdiction in bankruptcy, save on appeal, was supposed to have been taken away from the Vice-Chancellor, and it was at first assumed that the whole of the Vice-Chancellor's jurisdiction in bankruptcy, save the appellate, was transferred from his Honour to the Commissioners of the Court of Bankruptcy, by the 12th clause ; for instance, it was thought that a bankrupt, after the lapse of seven or fourteen days mentioned in sec. 104, might still prefer a petition to the Commissioners, under this general jurisdiction, to annul the

(a) And 18 Law Times, 269.

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adjudication, for any defect of the requisites, such as the utter want of any petitioning creditor's debt, and so forth ; and thus it was decided by the Vice-Chancellor Knight Bruce in *Re Dimmock*, where it was held, that if the bankrupt did not avail himself of sec. 104, by applying to the Commissioner within the seven or fourteen days, as the case might be, or did not appeal within the time allowed, then, by sec. 233, the *Gazette* containing the adjudication was declared conclusive evidence of the bankruptcy, as against the bankrupt. This decision, it will be observed, was made on an adverse application ; but it proves that the power of the Commissioners, as to annulling, is not so extensive as was supposed, and that the Court of Bankruptcy must be very wary not to exceed the limits of its jurisdiction. If the Commissioner has not power to make an order adversely, can any consent confer jurisdiction ?

For it must be remembered that this is not a mere question of practice : if I act without jurisdiction, my order is, of course, a nullity ; and many years after it has been made, some conveyancer may discover its invalidity, and object to a title to land, on the ground that the order annulling was itself a nullity, and the estate still vested in the assignees under the bankruptcy.

The present application is to annul with the consent of creditors. Formerly the practice was to make this order without requiring the consent of every one creditor, it being sufficient if the consent was obtained of so many of the creditors as had actually proved or claimed under the bankruptcy at the time the order was made.

In the case now before me, every creditor who has proved or claimed, and all the assignees, do consent to the adjudication being annulled ; in fact, I am assured that all the creditors have signed their assent but three, two being corporations, and the third abroad.

The question, then, is, have I jurisdiction to make the order asked ?

Mr. Shackles, who appears for the petition, states that such orders are habitually made in the London and other Courts of Bankruptcy; if so, I should be most anxious to follow the precedents set by my learned colleagues.

Having regard, then, to the warning of the decision in *Ex parte Carter*, can I find that I have jurisdiction to make such an order, which undoubtedly could formerly have been made by the Vice-Chancellor in Bankruptcy, confirmed by the Lord Chancellor?

Sec. 12 says that the Court (that is, the Commissioner), in the exercise of its primary jurisdiction, by virtue of this Act, shall have superintendence and control in all matters of bankruptcy.

I confess that I am at a loss to know what meaning to give to the word "primary," not being aware of any secondary jurisdiction; but passing that by, the words "control in all matters in bankruptcy" would appear to confer a very extensive jurisdiction indeed; but, on reading on a little further in sec. 12, I find myself cautioned by the words "save and except as may be, by this Act, otherwise provided."

Does, then, the Act "otherwise provide" touching the subject-matter of this petition?

That subject-matter is a petition to annul the adjudication with the consent of the whole of the creditors, who have accepted a composition, as I have been informed by Mr. Shackles.

It appears, on turning to the Act, secs. 211 to 231, that the Legislature contemplated a complete provision touching arrangements or compositions with creditors: one subdivision of the Act relates to arrangements between debtors and their creditors under the superintendence and control of the Court; the next subdivision is concerning such arrangements by deed; and then we arrive at the subdivision which comprises secs. 230 and 231, which sections contain a special enactment laying down the method of proceeding in cases similar to the present.

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Secs. 230 and 231 are thus headed: "Of compositions after bankruptcy. And with respect to compositions after adjudication of bankruptcy, be it enacted." And then follow secs. 230, 231, pointing out how the consent of nine-tenths of the creditors is to be obtained, and then the adjudication is to be annulled, and the petition for adjudication dismissed.

It appears to me that the terms of these clauses, coupled with the indication of the intent of the Legislature afforded by the words "and with respect to compositions after bankruptcy" (this being such a composition), show that the Court does not possess any power to annul with consent of creditors, save under secs. 230 and 231; so that I have not any jurisdiction to annul, on a composition, save under those clauses.

If, indeed, every single person who was a creditor at the time of filing the petition for adjudication, together with every person who could by possibility have a right to prove his debt under the bankruptcy,—if all these were to consent to my making such an order, at their own risk, I do not say that I might not, in a proper case, venture to annul the adjudication, because, though, as I think, I have no jurisdiction so to order (save under the terms of secs. 230, 231), yet, if every person who could by possibility object to the order were to consent to its being made, then I think I might venture to do so, because, though invalid, yet its invalidity might never be questioned, and the bankrupt would take the order *suo periculo*.

I say I would so venture to act in a proper case. Now with reference to the particular instance now before me, I regret to have to say that even if I thought that I had jurisdiction now to make the order asked, yet I entertain very serious doubts whether, under the very extraordinary circumstances attending this bankruptcy, of which I have judicial notice, I ought not, in the exercise of my discretion, to refuse to annul this bankruptcy till the bankrupt shall have passed

his last examination, and makes his order under the terms of secs. 230, 231. It being familiar law, that when an application was made to the general jurisdiction of the Lord Chancellor to annul, the order was entirely in his discretion.

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Two young men have been declared bankrupts in this court, and have both been examined before me ; they have both been connected, in the way of business, with this bankrupt, Harris, and they have both made statements in open court, which have not hitherto been contradicted, which, if true, would show that this bankrupt has been engaged in a most scandalous and nefarious system of swindling ; and they have both stated, what for the credit of human nature every one must wish to be incredible, but which has not yet been attempted to be disproved, that this bankrupt advised both these young men to insure their stocks, and then remove such stocks, and then set fire to their houses, with intent to defraud the assurance office. I will say no more of the statements made by these young men but this, that if only a portion of the charges made by them against the bankrupt is true, he may have to answer for his acts at the bar of a criminal court, for offences against the bankrupt law ; in which case, to annul this bankruptcy, might amount to something very like sanctioning a species of compromise of criminal offences.

Under these circumstances, I think it fit that this bankrupt should pass his last examination, as required by sec. 230, and then apply, under that section, to annul with consent of nine-tenths of his creditors.

I notice that the conclusion of sec. 231 contains an enactment which it may be highly expedient to insist upon in a case like the present ; it is as follows : “ And if any creditor shall agree to accept any gratuity, or higher composition, for assenting to such offer, he shall forfeit the debt due to him, together with such gratuity or composition ; and the bankrupt shall, if thereto required, make oath before the

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Court, that there has been no such transaction between him and any of his creditors ; *and that he has not used any undue means or influence with any of them to attain such assent.*"

I have to notice that this petitioner was not quite prepared to ask for the order to annul, till Friday, the 3rd of April ; and this, the 7th of April, is the day fixed for the bankrupt's last examination.

In conclusion, I shall observe that if there existed no appeal from my order, I might be tempted to make an order which, I am told, is commonly made in London ; but entertaining grave doubts on the question of jurisdiction, I wish the point to be determined and set at rest by the Lords Justices.

(Before Mr. Commissioner FONBLANQUE.)

Tuesday,
June 15th.

Re BEAUMONT.

Proof by
surety.

Surety for a debt due to the bankrupt must pay or satisfy the whole debt before he can be allowed to prove ; but the administration of a deed surety was allowed to enter a claim, to stand until it could be ascertained whether the estate of the deed surety could pay the debt.

T. H. having drawn upon bankrupt for 285*l.* 9*s.*, which bill was disbursed, paid to the holders 193*l.* 2*s.* ; and subsequently died.

Rees, solicitor, for the holder, applied to prove for 95*l.* 17*s.*, the balance due on the bill.

Millar, solicitor, for the administratrix of T. H., suggested that the holder should prove for the whole amount of the bill, and stand as trustee for the administratrix for so much as she had paid, or should hereafter pay.

By the COURT.—This is a novel application. A surety, or person liable, must by the words of the statute pay the whole debt, or part in satisfaction of the whole, before he is

allowed to prove ; and a common right might arise, if any other course was to be pursued.

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Re
BEAUMONT.

Millar.—The administratrix cannot pay the whole, this being merely a simple contract debt, till she has ascertained that there are no other debts entitled to priority : in the mean time she will not be represented under the estate of the bankrupt.

By the COURT.—Under those circumstances, she may enter a claim for 193*l.* 2*s.*

(Before Mr. Commissioner FANE.)

Re TAYLOR, *ex parte* RICHARDS.

Saturday,
May 15th.

THIS was a petition by Thomas Richards, the executor and sole residuary legatee of William Richards, for the sale of certain leasehold premises at Kennington, Surrey, belonging to the bankrupt, the lease of which had been deposited with the petitioner's testator, as security for a loan of money, in the year 1842. The petition prayed that the costs of the petition and sale, &c. should be paid out of the proceeds.

Written memorandum when sufficient to entitle equitable mortgagee to costs of sale, &c.

Bagley, counsel, for petitioner.—The only question is, whether the petitioner is entitled to costs, and that depends upon the question whether the mortgage is evidenced by writing. It is admitted that there was no writing at the time the lease was deposited by the bankrupt with the testator, William Richards ; but in March, 1851, the present petitioner, who then stood in the place of William Richards, entered into an arrangement for the settlement of certain partnership disputes with the bankrupt Taylor, upon which a memorandum of agreement was drawn up and signed by the authorized

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agent of Taylor, and by the petitioner, which memorandum contained these words: "Mr. Richards to give up the lease of the houses at Kennington upon payment of 200*l.* and interest from this date, 25th March, 1851." From this memorandum, it was clearly to be inferred that the petitioner held the lease in question as security for 200*l.* and interest, the precise amount which the petitioner now claimed to be entitled to upon the footing of his mortgage. That the memorandum was long subsequent to the deposit of the lease, did not affect the petitioner's right to costs. (*Ex parte Reynolds, re Moore*, 4 Deac. & Chit. 279.)

Linklater, solicitor, for the assignees.—The petitioner is not entitled to costs; for the only written memorandum produced, that of the 25th March, 1851, is consistent with the petitioner not holding the lease as equitable mortgagee, but in a different character. Besides, it appears from the preceding parts of the memorandum, that it was made in contemplation of some arrangement by deed which was never executed.

Mr. Commissioner FANE.—It may be clearly inferred from the memorandum, signed by an authorized agent of the bankrupt, Taylor, before his bankruptcy, that the petitioner held the lease in question under circumstances which induced Taylor to believe that he could not demand the lease without payment of 200*l.* and interest. The sum specified in the memorandum is precisely that now claimed by the petitioner as equitable mortgagee. It is impossible to say there is no written evidence that the lease was deposited as security for money, and I think the evidence is sufficient to entitle the petitioner to his costs.

Order as prayed for.

1851.

(Before Mr. Commissioner ELLISON.)

*Re ATKINSON. (a)**Tuesday,
Dec. 9th.*

THIS was an application by the assignees, after the sale and conversion by them of stock in trade and furniture in the reputed ownership of the bankrupt, for an order, under the 125th section of the Bankrupt Law Consolidation Act, 1849, to sell and dispose of the same for the benefit of the creditors.

The facts of the case were these :—

Atkinson, the bankrupt, kept an inn at Newcastle-on-Tyne. On the 30th of August, 1850, he committed an act of bankruptcy by departing from his dwelling. In 1847 he granted a mortgage of his stock in trade, with power of sale, to a creditor (Mr. Heslop, of Darlington, a wholesale spirit-dealer), to secure a sum found due on an account stated, for spirits supplied to him in his trade. Atkinson was then carrying on business at Croft, near Darlington, in the county of Durham, from which place he removed to Newcastle with the residue of his stock and his furniture, whereof, and of all stock subsequently acquired, Heslop allowed him to continue in the possession and apparent ownership. The stock and furniture actually upon the premises at the time of the act of bankruptcy were in Atkinson's possession, but were claimed by Heslop to be his, under the deed of assignment for securing the debt, which continued to be due and owing to him. This being the state of matters on the 4th of September, 1850, Heslop, who had heard at Darlington, on that or on the previous day, that the bankrupt had absconded, came to the inn at Newcastle, and put a man in possession of all the property therein, under his deed. Before any sale of the goods, and on the 9th of September, a petition for adjudication of bankruptcy, founded on the departing from home, was pre-

Mortgagor in possession. Order and disposition.

Mortgage of stock in trade with power of sale.

Mortgagee permitted the stock to remain in the possession of the mortgagor up to the time when the latter committed an act of bankruptcy, on which he was adjudicated a bankrupt :

Held, that the stock passed to the assignees as being in the bankrupt's order and disposition.

(a) See *Heslop v. Baker*, 6 Exch. 740.

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sent to the Court of Bankruptcy for the Newcastle district, under which petition Atkinson was duly found bankrupt, and on the messenger entering, Heslop's man withdrew. The assignees, as soon as they were chosen, contracted with a person for the sale and purchase of the goods in question, and of their own authority, without any application to the Court, sold the same to the purchaser, and received the proceeds, which were paid in to the credit of the estate. Heslop thereupon sued the assignees in trover; and at the trial of the action at the assizes, the jury found that the goods in question were in the reputed ownership of the bankrupt at the time of his bankruptcy, with consent and permission of the plaintiff Heslop, and a verdict passed for the defendants, the assignees. But, on behalf of the plaintiff, it was objected at the trial, that the provision made by the 125th section of the Bankrupt Law Consolidation Act, 1849, had rendered it necessary for assignees to obtain an order of the Commissioner before they could sell property in the reputed ownership of a bankrupt; and this question was argued before the full Court of Exchequer on a motion for a new trial. In June, 1851, Mr. Baron Parke delivered the judgment of the Court, which was to the effect that an order of the Commissioner must be obtained by assignees to authorize them to deal with property so circumstanced, and no such order having been obtained in the present case, a new trial was awarded. The assignees thereupon applied to Court for an order to sell and dispose of the goods in question, as if the sale were still to be made. Upon that application, Heslop, the plaintiff in the action, and the bankrupt, were severally examined, and the solicitor for Heslop contended that the order should not be made. His objections were, first, that as the goods had been already sold, there was not, as he submitted, any property for the order to operate upon; second, that the seizure by Heslop was a transaction within the 133rd section of the Bankrupt Law Consolidation Act, 1849, which section relates to "transactions not affected by bankruptcy," and renders valid

executions levied by seizure and sale before a petition for adjudication, notwithstanding a prior act of bankruptcy, provided the creditor levying had not notice thereof; and third, that if it be discretionary in the Court to make such an order, the Court ought not, upon the merits in the present case, to make the order prayed by the assignees.

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JUDGMENT.

The question being new, and of much importance, I took time to consider this application, and for a reason which I will presently state, I directed that evidence should be given before me on the question whether Mr. Heslop, at the time of seizure, had notice of the act of bankruptcy. I am told the jury at the trial found this in the affirmative; however, the evidence has been given before me, and I now proceed to state the decision at which I have arrived, and the reasons on which it is founded.

I shall first take the second of the objections urged on behalf of Mr. Heslop to my making this order. That objection is, in effect, that the seizure by Mr. Heslop was a transaction not affected by bankruptcy, and sufficed to give him a title to the goods in question as against the rest of the creditors, notwithstanding those provisions of the laws by which property in the reputed ownership of a bankrupt at the time of the bankruptcy passes to the creditors generally. Now, it is most important to observe, that a clear distinction, as it appears to me, is made by the Bankrupt Law Consolidation Act itself between property in the reputed ownership of a bankrupt and property of which he is the actual owner at the time of seizure. It appears to me, that the protection given by the 133rd section of that statute to transactions which take place before the petition, and without notice of an act of bankruptcy, is given in respect of goods which are the actual property of a bankrupt; and in the absence of authority, I should have no hesitation in holding that it is not competent to the true owner of goods in the reputed owner-

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ship of a bankrupt at his bankruptcy, to acquire a title to such goods, as against the rest of the creditors, by an act done within the meaning of the 133rd section, or, in other words, to defeat the operation of the doctrine of reputed ownership. I shall advert presently to the two cases which are authorities for a contrary conclusion.

For a long period after the statute of the 13th Elizabeth, c. 7, transactions with a bankrupt were held to relate to the act of bankruptcy; but the severity of the doctrine as to the relation to the time of the act of bankruptcy of transactions with a bankrupt has been modified from time to time in favour of persons dealing *bonâ fide* with their debtor. The statute of the 13th Elizabeth, c. 7, is the origin of that doctrine of the relation of transactions to the act of bankruptcy on which so many important decisions are to be found in the books. [His Honour here referred to the enactment in that statute, and traced its modification in the statutes 1 Jac. 1, c. 15; 21 Jac. 1, c. 19; 46 Geo. 3, c. 135; 49 Geo. 3, c. 121; 56 Geo. 3, c. 137; and 6 Geo. 4, c. 16, s. 72.] The general effect of all these modifications was, that all *bonâ fide* transactions and executions which were had or levied more than two months before the issuing of the commission were valid, notwithstanding a prior act of bankruptcy, provided the creditor had not at the time of the transaction or execution notice of that prior act. [The Commissioner then referred to 2 & 3 Vict. c. 11, and 2 & 3 Vict. c. 29.] At length, by the Consolidation Act, *bonâ fide* transactions in respect of a bankrupt's property, and executions levied thereon, are declared valid, and not affected by a previous act of bankruptcy, provided the creditor so dealing or levying had not notice of an act of bankruptcy. But while this class of provisions has undergone modification by many statutes, and while the original severity of the doctrine of relation has been thus relaxed, the enactments which relate to property in the reputed ownership of a bankrupt have been preserved in their original severity; and it appears to me that the Bankrupt Law Con-

solidation Act makes a clear distinction, as I have said, between property which is in the reputed ownership of a bankrupt, and property of which he is the actual owner ; and that all the provisions by which the severity of the law of relation has been modified apply to goods which are the property of the bankrupt, and do not apply expressly nor, as it appears to me, by implication, to the goods of any person other than the bankrupt. The object of the other provisions in the bankruptcy statutes is, to transfer to the creditors such property and interest as actually belong to the bankrupt himself ; but the provision with regard to property in the reputed ownership of a bankrupt has the effect of giving to the creditors, in respect of the apparent ownership of the bankrupt and the credit supposed to be derived therefrom, a right derogatory and paramount to that which would exist as between the bankrupt and third persons. The object of this provision being to protect all the creditors of a trader against the consequences of that false credit which might be acquired by his being suffered to have the order and disposition of property as his own which does not really belong to him, it is a provision which must undoubtedly have been at all times of high importance to the interests of fair trade. The intent and meaning of this law is well explained by Lord Redesdale in *Joy v. Campbell*, 1 Sch. & Lef. 336 :—[His Honour read from the judgment, and continued.] In order, therefore, to bring a case within this doctrine, there must be a real owner distinct from an apparent owner, and the real owner must consent to the apparent ownership of the bankrupt. To come within the operation of the 125th section of the Consolidation Act (which I may consider merely a re-enactment of the provision in former Acts with regard to property in the reputed ownership of a bankrupt), the goods must be in the bankrupt's possession at the time of his becoming bankrupt ; and the time of his becoming bankrupt is, according to the judgment in *Load v. Green*, 15 M. & Wels. 216 ; *Lyon v. Weldon*, 2 Bingh. 334 ; and *Smith v. Topping*, 5 Barn. & Adol. 674,

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the time of committing the act of bankruptcy. It is said that the doctrine of reputed ownership is not now favoured by the Superior Courts; and certainly it may be doubted whether, if the Courts were now called upon for the first time to put a construction on the statute, they would apply the doctrine, for example, to cases of assignments of debts, bonds, and policies, where no notice of assignment had been given, and would hold that property of this nature remained in the order and disposition of the bankrupt with consent of the true owner. I wish to refer the parties to the judgment of Pollock, C. B., and Parke, B., in *Belcher v. Bellamy*, 2 Exch. 306. But I am not aware of any authority which takes away from the creditors generally the goods and chattels, such as furniture and stock in trade, of a person who has “improperly and unconscientiously, as the law supposes,” allowed such property to remain in the apparent ownership of a trader down to the time of the bankruptcy, and thereby enabled him to obtain false and delusive credit. It was for some time a controverted question, whether the operation of the 21 Jac. 1, c. 19, s. 11, was not restrained by the preamble to property formerly belonging to the bankrupt, and remaining in his possession; but the contrary was finally settled in 1774 in *Mace v. Cadell*, 1 Cowp. 232; and the provisions of that statute have been substantially re-enacted in the several bankruptcy statutes down to the Consolidation Act, and are in substance preserved by that Act likewise.

The 133rd section of the Consolidation Act, and the like clauses in former Acts, relate, in terms, to the property of the bankrupt, whereas the 125th section, and the like clauses in former Acts, relate, as I have pointed out, to property which belongs to some other person, and of which the bankrupt is only the apparent owner. As to this latter property, the act of bankruptcy is the dividing point; and it appears to me that a seizure by the real owner is not protected by the 133rd section. That section, as it appears to me, has no application to the power which is given to the Court over that description

of property which is the subject of the 125th section. And even if it had, seizure and sale are necessary before the party claiming adversely can acquire a title as against the rest of the creditors. A creditor, by the seizure of the goods of his debtor, does not acquire the property in such goods, nor divest it from the bankrupt. The case of *Giles v. Grover*, 9 Bingh. 178, and the expressions of Lord Chief Justice Tindal in that case, at p. 767 of the same volume, may be referred to on this point.

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In the absence, therefore, of express authority to the contrary, I should decide that the seizure, by a person claiming to be true owner, of property in the reputed ownership of a bankrupt, is not a protected transaction—a “transaction not affected by bankruptcy”—and cannot deprive the Court of Bankruptcy of the power to order such property to be sold for the benefit of the creditors. But the case of *Ex parte Styán*, 1 Phill. 105; and the case of *Pariente v. Pennell*, 2 Moody & Rob. 517 (in which case the doctrine as laid down by Lord Chancellor Lyndhurst in *Re Styán*, was followed by Lord Chief Justice Tindal), have occurred to me, while considering the present application, to be authorities for the proposition, that a person who claims to be real owner for valuable consideration of property in the reputed ownership of a bankrupt, may, by an act done by him after the act of bankruptcy and before the petition, deprive the Court of Bankruptcy of the power to order such property to be sold for the creditors under the 125th section; or, in other words, that the real owner’s seizure and sale, if without notice of the act of bankruptcy, may be a “transaction not affected by bankruptcy,” and be protected by the 133rd section of the Consolidation Act.

The decisions in *Re Styán*, and in *Pariente v. Pennell*, it will be observed, were given many years ago; but as they are undoubted authorities, it appeared to me in the present case, that I ought to have evidence laid before me on the point of notice at the time of Mr. Heslop’s seizure; and evidence has

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been given before me accordingly. The result of it is, that I am satisfied he had express notice of the act of bankruptcy, before he entered and took possession, and therefore the authority of the cases I have just mentioned is not applicable in the present case.

Upon these grounds, therefore, I overrule the second of the objections taken on behalf of Mr. Heslop to my making an order under the 125th section of the Consolidation Act. The first objection is, in effect, that I ought not to make that order now, inasmuch as the property to be affected by it has been already sold ; but my decided opinion is, that I am bound to make the order. Hitherto, property in the reputed ownership of a bankrupt has been taken by the assignees like other property in the bankrupt's possession, and the Consolidation Act has for the first time given power to the Commissioner to order it to be sold for benefit of the creditors—a provision which appears to throw on the Court of Bankruptcy the duty of trying the whole question, and deciding upon the evidence. Property in the reputed ownership of the bankrupt, within the meaning of the 175th section (which, as I have said, is a mere re-enactment in substance of former provisions on this subject), passes to the creditors ; but they have not had the benefit intended to be given to them until the order contemplated by the statute shall have been made ; and the Court has not finally discharged its duty, or exercised the power given to it for the benefit of creditors, until it shall have considered the facts, and made an order authorizing the assignees to sell and dispose of the property. I need not inquire whether, in the circumstances of the present case, my order will have the effect, by relation or otherwise, of giving a valid title to the vendor from the time of the sale to him ;—that is a question which will be more properly considered elsewhere. I deem it my duty to make the order.

I have now, therefore, only to dispose of the third objection ; and, without deciding whether the power to make the order is discretionary or not, I am satisfied that I am now dealing

with precisely the case to which the doctrine of reputed ownership has been always held applicable; it is a case within the very words of the statute of 21 Jac. 1, c. 19, and is the case of an owner who has allowed the bankrupt to remain in possession of his property as reputed owner, and to obtain credit on the faith of it.

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Order for sale made as prayed.(a)

(a) *Heslop v. Barker*, 6 Exch. 740. The marginal note is as follows:—Goods in the order and disposition of a bankrupt as reputed owner, do not pass to his assignees under the 141st section of the Bankrupt Law Consolidation Act (12 & 13 Vict. c. 108); but in order to vest the property in such goods in the assignees or other person, the Court of Bankruptcy must make an order under the provisions of the 125th section. (Platt, B., *dubitante*.) Parke, B., in giving the judgment of the Court said (*inter alia*), “At a time prior to 1 & 2 Wm. 4, c. 56, s. 25, there is no question that the general assignment operated to vest in the assignees goods in the reputed ownership of the bankrupt.” When that statute had passed, it is a question whether such goods did pass by the adjudication, by virtue of the 25th section. That section provides, that “When any person hath been adjudged a bankrupt, all *his* personal estate and effects, present and future” (not *the* personal estate, &c.), “which by the laws now in force *may be* assigned by Commissioners acting in the execution of a commission against such bankrupt, shall become absolutely

vested in and transferred to the assignees by virtue of their appointment, without any deed of assignment, as if *such* estate were assigned by deed to such assignees and the survivor.” On the one hand, the language of the former part of the section appears to apply to the bankrupt’s own property only; on the other, the words “which by the laws now in force may be assigned by the Commissioners,” may give the former words a more extensive operation.

In a note on this statute, by Messrs. Koe and Miller, in their edition of Mont. & Ayr’s Bankrupt Law, vol. ii. p. 230, it is said that neither the property mentioned in the 71st section, nor that in the 72nd section of 6 Geo. 4, c. 16 (goods in the possession and reputed ownership), vests in the assignees by the adjudication. If this be so, no question could possibly arise in this case, for a similar construction would have to be made of the 141st section of the 12 & 13 Vict. c. 106, which would pass only the bankrupt’s own personal estate, by its proper description of *his* personal estate and effects. But supposing it to be otherwise, and that by a

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Re
ATRINSON.

liberal construction of the 1 & 2 Wm. 4, c. 56, s. 25, it ought to be held that the words "his estate" comprised all the estate which by the laws then in force *might* be assigned by the Commissioners to the assignees, and consequently that the property in the reputed ownership of the bankrupt did vest under that statute, it by no means follows that it could pass under the 141st section of the new Bankrupt Act, even if it stood alone; for in this section we do not find the only words which might enable us to give a more extensive signification to the words "all *his* estate," that is, the words "which by the laws now in force may be assigned by Commissioners;" under which words it may be supposed that the Legislature meant to comprise all that could be assigned. And when we find that in the same Act of Parliament, the 72nd section of 6 Geo. 4, c. 16, is re-enacted with this alteration only, that instead of the

Commissioners having power to sell and dispose of the same, that is, practically to assign them to the assignees, *the Court* has power not to sell and dispose, but to *order* them to be sold and disposed of, we think that the meaning of these enactments in the new statute is, that in the case of the bankrupt's own property it is to pass by the adjudication; but in case of chattels in his reputed ownership, something different must be done, and the Court must make an order to sell and dispose of the same, in order to vest the property in the assignees or some other person. * * * *

Whether this state of the law arises from a mistake in the framer of the Act, or was intended, is a matter of conjecture. *Possibly* it may have been a mistake in making these enactments in the terms used; * * * according to the words of the enactment, it is clear that the goods in question do not pass by the adjudication.

GENERAL ORDERS

MADE UNDER THE

BANKRUPT LAW CONSOLIDATION ACT, 1849.

12th October, 1849.

IT IS ORDERED AS FOLLOWS, that is to say :—

That the several Rules and Orders in or relating to matters of Bankruptcy, or to the official assignees, or other officers in bankruptcy, or to the forms of proceedings, or the practice to be observed in the Court of Bankruptcy, and being in force at or immediately preceding the commencement of the Bankrupt Law Consolidation Act, 1849, shall, from and after the commencement of such Act, and until further order, be the Rules and Orders under the same Act, for the better carrying the said Act into execution ; and as regards the duties to be performed by the chief and other registrars, the accountant-master, clerk of enrolments, official assignees, registrar of meetings, and clerks, and by the messengers, ushers, and other under-officers of the Court of Bankruptcy, and generally for regulating the practice of the court, and the forms of proceedings, where not provided for in the said Act, so far as such Rules and Orders are applicable to such purposes, and not inconsistent with any of the provisions of the said Act ; and that, subject to such restriction, the said Rules and Orders shall extend and apply, not only to commissions and fiats in bankruptcy, but to petitions for adjudication of bankruptcy, and the proceedings thereunder respectively, and generally to all matters provided for by the said Act.

JOSHUA EVANS,
JOHN S. M. FONBLANQUE,
R. G. C. FANE,
EDWARD HOLROYD,
EDWARD GOULBURN,
H. J. SHEPHERD,
HENRY J. STEPHEN,
EDMUND ROBERT DANIELL,
Commissioners.

Approved :
COTTENHAM, C.

May 31st, 1850.

WHEREAS by the Bankrupt Law Consolidation Act, 1849, it is enacted, amongst other things, as follows, that is to say, "That the official assignee of each bankrupt's estate, and every official assignee appointed by the Court under any petition for arrangement between a debtor and his creditors, where the estate and effects of such petitioning debtor shall vest in such official assignee, either alone or jointly, in manner therein mentioned, shall pay to the credit of the account intituled 'The Chief Registrar's Account,' such sum not less than one-eighth of a pound, and not exceeding five pounds per centum on the gross produce from time to time of any such estate, such sum, within the limit aforesaid, and the time or times for payment thereof, to be fixed by the Senior Commissioner, with the approval of the Lord Chancellor, and the Senior Commissioner, with the like approval, may from time to time lessen or increase such sum, within the limit aforesaid, as may seem just and reasonable, upon consideration of the amount from time to time standing to the said account, and of the claims from time to time chargeable thereupon:" Now I do hereby order, that the official assignee of each bankrupt's estate, and every official assignee appointed by the Court under any petition for arrangement between a debtor and his creditors, where the estate and effects of such petitioning debtor shall vest in such official assignee either wholly or jointly in manner mentioned in the said Act, shall before every audit under any bankrupt's estate, and before the passing of every account of the official assignee under any petition for arrangement, pay to the credit of the account intituled "The Chief Registrar's Account," on the gross produce from time to time of the estate of any bankrupt or bankrupts, and of any petitioner or petitioners under any petition for arrangement, sums after the rates hereinafter mentioned, that is to say,

Upon the first moneys of such gross produce

not exceeding 500*l.* 5 per cent.

Upon all further moneys of such gross produce,

above 500*l.* and not exceeding 5,000*l.* 3 per cent.

Upon all further moneys of such gross produce,

above 5,000*l.* and not exceeding 10,000*l.* . . 2½ per cent.

Upon all further moneys of such gross produce,

above 10,000*l.* and not exceeding 20,000*l.* . . 1 per cent.

Upon all further moneys of such gross produce,
above 20,000*l.* and not exceeding 30,000*l.* . . $\frac{1}{2}$ per cent.

Upon all further moneys of such gross produce,
above 30,000*l.* and not exceeding 100,000*l.* $\frac{1}{4}$ per cent.

JOSUA EVANS.

Approved :

COTTENHAM, C.

Wednesday, the 9th day of October, 1850.

ORDER made by the Right Honourable Thomas Lord Truro, Lord High Chancellor of Great Britain, relating to the payments to be made to the Chief Registrar's Account by the Commissioners of Inland Revenue under the provisions of the Bankrupt Law Consolidation Act, 1849, and to the allowance upon the sale and distribution of Stamps, and the allowance of spoiled and other Stamps, under the Act, ss. 33 and 48 to 52.

IT IS ORDERED :—

That once in every week, the Commissioners of Inland Revenue shall cause to be paid into the Bank of England, to the credit of the Accountant in Bankruptcy, to the account entitled "The Chief Registrar's Account," such sums of money as may have been received by them for stamps sold under the provisions of the Bankrupt Law Consolidation Act, 1849, and once at least in every three months, as soon as practicable after the fifth days of January, April, July, and the tenth day of October respectively, the said Commissioners shall cause to be delivered to the Chief Registrar of the Court of Bankruptcy, an account of the number and description of stamps issued, and of the sums of money collected or received by them under the provisions of the said Act, and after paying, deducting, and retaining all costs, charges, and expenses incurred by them, or by their order, in carrying the said provisions into effect, and all allowances made by them for spoiled stamps, shall pay the balance into the Bank of England, to the credit of the Accountant in Bankruptcy, to the account entitled "The Chief Registrar's Account;" and notice of such payment, as well as of the weekly payments before mentioned, shall, at the time of making the same respectively, be given by the Commissioners of Inland Revenue to the Chief Registrar, who shall certify the amount of such payment to the senior Commissioner.

That the poundage to be allowed upon the sale and distribution of stamps under the said Act, shall be at the rate now or from time to time allowed by the said Commissioners of Inland Revenue to their distributors for other stamps, and the discount or poundage to vendors of stamps shall be at the rate now authorized by law to be granted on the purchase of stamps under the circumstances and of the description and amount provided in that behalf: and further, that the practice now and from time to time to be adopted by the said Commissioners with respect to the allowance of stamps (not issued under the provisions of the said Act) as may be spoiled or rendered useless or unfit for the purpose intended, or for which the owner may have no immediate use, or which through mistake or inadvertence may have been improperly or unnecessarily used, and with respect to the mode and time of applying for and obtaining such allowance, shall, so far as the same are and may from time to time be applicable, be adopted with respect to stamps issued under the provisions of the said Act, except that no such allowance shall be made for the stamp on any petition for adjudication of bankruptcy, unless a Commissioner of the Court of Bankruptcy shall direct by indorsement on such petition that such allowance shall be made. Provided also, that in any case where the practice of the said Commissioners of Inland Revenue shall not be applicable, the Court may order the allowance of any other stamps appointed to be used under the said Act.

TRURO, C.

RULES AND ORDERS

MADE IN PURSUANCE OF THE

BANKRUPT LAW CONSOLIDATION ACT,

1849,

12 & 13 VICT. CAP. 106, SECT. 8.

WITH respect to the several matters hereinafter mentioned—
IT IS ORDERED AS FOLLOWS, that is to say :

Definition of Terms.

I. That all words and expressions used in these rules or orders shall be construed in conformity with the interpretation clause (sect. 276) of the Bankrupt Law Consolidation Act, 1849.

Definition of
terms, &c.

Petition for Adjudication of Bankruptcy.

II. Every petition for adjudication of bankruptcy shall be fairly written or printed on parchment in the form given in the Schedule M or O of the Bankrupt Law Consolidation Act, 1849 (as the case may be), and no alterations, interlineations or erasures shall be permitted without leave of the Court ; except so far as the same may be necessary, in order to adapt the printed form to the circumstances of the particular case.

Petition for
adjudication of
bankruptcy to
be on parch-
ment.

III. All petitions for adjudication and the affidavits in support of the same shall be carefully examined by the chief registrar in London, or by one of the registrars in the country districts,

Petition and
affidavit in
support thereof
to be examined

by registrar
before filing.

before they are filed, and any petition or affidavit not being in conformity with the provisions of the Bankrupt Law Consolidation Act, 1849, and these orders, shall be rejected, subject however to an appeal to the commissioner of the day in London ; or to the commissioner in attendance in the country.

Search to be
made for pre-
vious fiat or
petition.

IV. The chief registrar shall carefully search whether any fiat in bankruptcy or petition for adjudication of bankruptcy has been issued or filed against or by the same person or persons, alone or jointly with any other person or persons, and shall endorse the result of such search on the petition previous to transmitting the same to the registrar of the day. Similar searches and endorsements shall be made by the registrar in attendance in the country.

Where two or
more petitions,
receipt of one
by lot.

V. That in case two or more persons shall apply at the same time to present petitions to the Court in London or to a district Court for adjudication of bankruptcy against the same person, and shall both be prepared to prosecute the same immediately, it shall be determined by lot which petition shall first be received and filed, but if one of such persons only is prepared to prosecute his petition immediately, such person shall be preferred ; and in case one of such petitions shall be by the debtor or debtors, then the other petition (or one of the other petitions, to be ascertained as above), shall be preferred ; and no subsequent petition for adjudication of bankruptcy against the same trader, either alone or jointly with any other person or persons, shall be proceeded with further than receiving and filing the same, until after the dismissal of the first, or other petition, or the expiration of the time allowed for prosecuting the same.

Second petition
by creditor
neglecting to
prosecute a
former petition.

VI. That if any creditor shall petition for adjudication of bankruptcy, and shall neglect to prosecute his petition within the time limited for that purpose, no subsequent petition for adjudication of bankruptcy against the same trader or traders, or any of them, either alone or jointly with any other person or persons, shall be presented by the same creditor without the special leave of the Court to which the previous petition was addressed.

Allotment of
petitions for ad-
judication of

VII. That every petition for adjudication of bankruptcy in London, whether presented by a creditor or by the trader himself,

shall forthwith, after the filing thereof in the office of the chief registrar, be allotted by ballot by the registrar of the day, in the presence of a commissioner, and in the presence of the solicitor acting in the matter of such petition, to one of the commissioners of the court, and such allotment shall be entered in a locked book to be kept for that purpose, to which book each registrar and commissioner shall have a key; and every such petition in any district court where there is more than one commissioner shall when filed be allotted in like manner by ballot, and entered in a locked book, to be kept as aforesaid.

bankruptcy in London. See sect. 94.

In district court.

VIII. In case of the absence of any commissioner, the registrar alone, and in case of the absence of any registrar, the commissioner alone, may, but in either case in presence of the solicitor, proceed to ballot any petition, endorsing on such petition the reason for his so proceeding.

If commissioner absent, registrar may ballot.

IX. That where a petition for adjudication of bankruptcy filed, either by a creditor or a trader, shall have been dismissed, or shall not have been prosecuted within the time limited, every second or subsequent petition presented to the same Court for adjudication of bankruptcy against the same person or persons, or any of them, and either alone or jointly with any other person or persons, shall be allotted to and prosecuted before the commissioner who shall have acted in the matter of the first petition, or to whom the same shall have been balloted.

Second or subsequent petition for adjudication to be prosecuted before the same commissioner.

X. Whenever any doubt shall arise as to the allotment of any petition in London, the same shall be determined by the senior commissioner, or in his absence by the commissioner of the day; and in the country by the commissioner in attendance.

Question on allotment of petition, how determined.

XI. The petitioning creditor's debt shall be carefully investigated previous to the adjudication, and all securities held by him shall at the same time be exhibited to the commissioner, together with a debtor and creditor account between the petitioning creditor and the intended bankrupt, which shall be filed with the proceedings, unless otherwise directed by the Court.

Investigation of the petitioning creditor's debt.

XII. The personal attendance of the petitioning creditor, and of the witness or witnesses to prove the trading and act of bank-

Personal attendance of petitioning creditor.

ditor, &c. how to be dispensed with.

ruptcy, upon the opening of the petition for adjudication, may be dispensed with, on special cause proved to the satisfaction of the Court.

Applications for adjudication in London, when to be made.

XIII. Except in case of emergency, all applications for adjudication in London shall be made to the commissioner of the day, in his private room, previous to the public sitting of the Court.

Disputing Adjudication of Bankruptcy. Section 104.

Notice to dispute adjudication. 12 & 13 Vict. c. 106, s. 104.

XIV. That if any person adjudged bankrupt intend to show cause against the validity of such adjudication, he shall cause notice in writing of such his intention to be served upon the petitioning creditor, or his solicitor, and upon the registrar, two clear days at least before the day appointed by the Court for showing cause against such adjudication, and in such notice shall state which of the following matters, namely, the petitioning creditor's debt or debts, the trading, or act or acts of bankruptcy, he intends to dispute.

Names of witnesses to be given, &c.

XV. That after serving such notice of his intention, he shall, on application, be forthwith furnished with the names of the witness or witnesses deposing to the matter in dispute, and shall, on payment for the same, have a copy of the deposition or depositions, or any of them, as the Court in its discretion may think fit.

Showing cause against adjudication and grant of further time.

XVI. That on the appearance to show cause against the validity of the adjudication, the petitioning creditor's debt, trading and act of bankruptcy, or such of those matters as the person adjudged bankrupt shall have given notice that he intends to dispute, shall again be proved *viva voce*, unless otherwise directed by the Court, and if any new evidence of those matters, or any of them shall be given, or any witness or witnesses to such matter shall not be present for cross-examination, and further time shall be desired to show cause, the Court shall, if it think the application reasonable, grant such further time as it may think fit.

*Jurisdiction of the Court of Bankruptcy, under Section 12 :
Motions and Petitions, and Practice thereon.*

XVII. That (unless the Court shall in any particular case otherwise direct) all applications to the Court in the exercise of its primary jurisdiction by virtue of the Bankrupt Law Consolidation Act, 1849, shall be, by way of motion, supported by affidavit, upon hearing which, the Court shall make such order therein as shall be just; but in cases in which any other party or parties than the applicant are to be affected by such order, no such order shall be made unless upon the consent of such person or persons, duly shown to the Court; or upon proof that notice of the intended motion and copy of the affidavit in support thereof has been served upon the party or parties to be affected thereby, four clear days at least before the day named in such notice as the day when the motion is to be made: Provided however, that the Court may, if it shall think fit, in any case where the party or parties to be affected by the order, or any of them, shall not have been duly served with a notice of the motion for such order, make an order calling upon the party or parties to be affected thereby, to show cause, at a day to be named by the Court in such order, why such order should not be made.

Mode of application to the Court, under 12 & 13 Vict. c. 106, s. 12.

XVIII. That every order to show cause shall be served upon the party or parties to be affected thereby, four clear days at the least before the day appointed for showing cause.

Service of order to show cause.

XIX. No warrant for the commitment of any person, pursuant to sect. 266 of the Bankrupt Law Consolidation Act, 1849, for disobeying any rule or order of the Court, shall be issued, unless notice of the intended motion for such warrant shall have been served personally upon the person to be committed, two clear days at the least before the day of hearing such motion; or unless an order to show cause why such warrant should not be issued shall have been personally served upon such person four clear days at the least before the day named in such order for showing cause: Provided however, that in cases in which it shall be made to appear to the Court that the person intended to be committed is keeping out of the way, and cannot be personally served with the notice of motion or of the order to show cause, it shall be lawful for the Court to make an order,

Previous to issuing warrant of commitment, under sect. 266, for disobeying any rule or order of Court, notice of motion or order to show cause to be personally served, &c.

directing substituted service of the notice or order to show cause, as may be best suited to the circumstance of the case; and service of such notice or order to show cause, according to the directions of such order, shall be deemed to be as effectual as if such service had been made personally.

Service of
notice of mo-
tion, or order
to show cause.

XX. In cases in which personal service of any notice of motion, or of any rule or order of the Court, is required, the same shall be effected, in the case of a notice of motion, by delivering to the party or parties to be served, and each of them, a duplicate of the notice of motion; and in the case of a rule or order, by delivering to the party or parties to be served, and each of them, a true copy of the order or rule, at the same time showing to him or them the original order or rule of the Court.

Signature and
attestation of
petitions in
general.

XXI. That, except where otherwise provided or required by the statute, or by these rules, every petition presented to the Court of Bankruptcy in London or in the country, shall be signed by the petitioner or petitioners: Provided always, that in the case of partnership or absence of any petitioner or petitioners from the United Kingdom, the signature of one of the partners, or of the party presenting the same on behalf of the person so absent, shall be sufficient, and the signature of each person signing the same shall be attested by the solicitor actually presenting the petition, or by some other solicitor, who shall state himself in his attestation to be the solicitor or agent of the solicitor of the party signing in the matter of the petition.

To be entered
with the regis-
trar.

XXII. That every such petition presented to the Court shall be entered with the registrar of the court to which the same is presented, and the order directing the attendance thereon shall be signed by the registrar, and under the seal of the Court; and the original petition, when served, shall be returned to the registrar on or before the hearing, and filed of record. And it shall not be necessary to recite such petition at length, but only the prayer thereof, in any order pronounced by the Court thereon.

Affidavits to be
filed.

XXIII. That every affidavit to be used in obtaining, supporting, or opposing any petition, or motion, or order for showing cause for or against any order or rule of Court, shall be filed

with the registrar of the court having the custody of the proceedings to which the same relates, two clear days at the least before the day appointed for the hearing ; and no affidavit in reply or in rejoinder is to be used except by leave of the Court.

No affidavit in reply.

XXIV. That the registrar, upon any affidavit being left with him to be filed, do endorse the same with the day of the month and year when the same was so left, and do forthwith file the same, with the proceedings to which the same relates.

Affidavits to be endorsed by the registrar, with the day when left for filing.

XXV. That no affidavit be filed, unless the same is properly intituled in the court and matter in which the same is to be used, and that after any affidavit is left with a registrar to be filed, the same is on no account to be delivered to any person whatever, except by order of the Court.

Affidavits to be intituled.

XXVI. Except in cases of emergency, all motions shall be made, and all petitions heard, before the commissioner acting in the particular bankruptcy to which the matter relates, or the commissioner acting for him in his absence, and in London, on the day on which he sits as commissioner of the day, and at the sitting of the Court, and in the order set down in the registrar's diary, unless the commissioner shall otherwise direct.

Hearing motions and petitions.

XXVII. Motions made by the Bar shall be heard according to the right of precedence, and motions made by attorneys in the order in which they have been set down in the registrar's diary previous to the public sitting of the Court.

Motions, order of making.

XXVIII. A short note of every motion shall be delivered to the registrar previous to the public sitting of the Court, specifying the bankruptcy or other matter to which the same relates, the name of the party on whose behalf the same is made, the name and residence of the attorney of such party (and of the counsel, if the same be made by counsel), the name of any party, and the name and residence of his attorney, on whom any notice of such motion has been served.

Note of motion to be delivered to the registrar.

Deposit of Costs on Appeal. Section 12.

Deposit on appeal. 12 & 13
 Vict. c. 106,
 s. 12.

XXIX. That at or before the time of entering an appeal against a decision or order of the Court of Bankruptcy, the party intending to appeal shall (in any case not otherwise specially provided for) deposit with the chief registrar such sum, not being less than 10*l.* and not exceeding 40*l.*, as the commissioner, whose order or decision is appealed from, or some other commissioner of the same court, shall direct, to satisfy so far as the same may extend, any costs that the appellant may be ordered to pay, and in the absence of any directions of a commissioner as to the amount of deposit, the sum of 20*l.* shall be so deposited. If it shall appear that there are several respondents in separate interests, the commissioner, if he shall think fit, may order a separate deposit as to every such respondent.

Allowance of Amendments.

Amendments
 may be allowed
 by leave of the
 Court.

XXX. That in any proceeding before the Court, the Court, if it think fit so to do, may allow amendment in any particular or particulars in the judgment of the Court not material to the merits of the case to be forthwith made on such terms as to re-swearing (in case of affidavits when necessary) and as to payment of costs, or both payment of costs and postponement, or otherwise, as the Court shall think reasonable.

Removal of Commissions and Fiats issued on or before the 11th November, 1842. Section 22.

Transfer of
 commissions
 and fiats into
 court. 12 & 13
 Vict. c. 106,
 s. 22.

XXXI. That every commission and fiat directed to any commissioners in the country, and opened, or purporting by the proceedings to have been opened, at any place situated within any one of the several districts appointed for holding Courts of Bankruptcy in the country, and not heretofore brought into court, shall be and the same is hereby transferred and removed into the District Court of Bankruptcy within the district in which such place shall be situate, and every commission and fiat directed to any commissioners in the country, and opened or purporting by the proceedings to have been opened in the

country elsewhere than at any place situated within any one of the said several districts, and not heretofore brought into court, shall be and the same is hereby transferred and removed into the Court of Bankruptcy in London, and all further proceedings in every commission and fiat so transferred and removed as aforesaid, shall be thenceforth prosecuted and carried on in the court to which the same is hereby ordered to be transferred.

XXXII. That all commissions and fiats directed to any commissioners in the country, and opened, or purporting by the proceedings to have been opened, in any of the counties or divisions or parts of the counties named in the schedule hereunder written, and transferred into the Court of Bankruptcy in London by the preceding order, be further prosecuted in such court before the commissioner of the said court named in such schedule, in conjunction with such county or counties, or divisions, or parts respectively.

Division of certain transferred commissions and fiats amongst commissioners in London.

SCHEDULE.

Mr. Commissioner EvansNorfolk.

{ Oxford.

{ That part of the county of
Dorset not being within the
Exeter district.

Mr. Commissioner Fonblanque

{ South Wilts.

{ North Hants.

{ Surrey.

Mr. Commissioner Fane

{ South Hants.

{ West Sussex.

Mr. Commissioner Holroyd ...

{ East Sussex.

{ Kent.

Mr. Commissioner Goulburn

{ Suffolk.

{ Essex.

{ Herts.

{ Berks.

Before the above-named commissioners, according to such scale of distribution as from time to time shall be directed by any three commissioners.

{ Rutland.

{ Huntingdon.

{ Cambridge.

{ Northampton.

{ Bedford.

{ Bucks.

With respect to the Chief and other Registrars.

Chief registrar's office.

XXXIII. That the chief registrar's office shall be at the Court of Bankruptcy in London, and shall be kept open daily, throughout the year, from ten till four o'clock (Sunday, Christmas Day, Good Friday, Monday and Tuesday in Easter Week, and any day appointed for a public fast or thanksgiving, excepted).

Affidavits to be filed.

XXXIV. That all petitions, affidavits, and other documents directed to be filed, except the affidavits mentioned in Rule XXIII. shall be filed in the office of the chief registrar at the Court of Bankruptcy in London, if relating to any bankruptcy or other matter under this Act, prosecuted in London, or with the registrar or registrars of the district court in which any bankruptcy or other matter under this Act, is prosecuted in the country.

Roll of attorneys.

XXXV. That a roll or book shall be kept by the chief registrar, in which shall be enrolled the names of all attorneys and solicitors entitled to practise in the Court of Bankruptcy.

Book, with chief registrar in London, for names and places of abode or business of enrolled attorneys and solicitors where they may be served with notices, &c.

XXXVI. That the chief registrar shall keep a book, in alphabetical order, for the purposes after mentioned, and the same shall be publicly kept in the Court of Bankruptcy in London, to be there inspected by any enrolled attorney or solicitor. And that every attorney or solicitor enrolled in the Court of Bankruptcy, shall at the time of his signing the book or roll, mentioned in Rule XXXV. enter in such alphabetical book his name and place of abode or business where he may be served with notices, summonses, orders, and rules, in matters depending in the court; and as often as any attorney or solicitor shall change his place of abode or business, he shall make the like entry thereof in the said book; and all notices, summonses, orders, and rules, which do not require personal service, shall be deemed sufficiently served on such attorney or solicitor if a copy thereof shall be left at the place last entered in such book, with any person resident at or belonging to such place; and if any attorney or solicitor shall neglect to make such entry, then the fixing up of any notice, or the copy of a summons, order or rule, for such attorney or solicitor, in the office of the chief registrar, shall be deemed as effectual and sufficient as if the same had been served at such place of residence or business as aforesaid.

XXXVII. That a like alphabetical book of names and residences shall be kept by the senior registrar of every district court in the country having two registrars, and by the registrar of every district court in the country where there is only one registrar, in which book every attorney and solicitor resident in, and usually practising in such district respectively, shall, in the like manner, and subject to the same regulations, enter his name and place of abode and business.

Like book in district courts in the country.

XXXVIII. That in case the place of abode or business of any attorney or solicitor be not within a circuit of five miles from the General Post Office in London, or within five miles of the place appointed for the sittings of any District Court of Bankruptcy in the country districts, such attorney or solicitor shall appoint, and enter in the said alphabetical book, some convenient place within a three miles' circuit of the General Post Office, if he be an attorney or solicitor usually practising in the Court of Bankruptcy in London, or within three miles of the place of sitting of the district court, if usually practising in any country district where such notices, summonses, orders, and rules as aforesaid may be served on him, subject to the regulations aforesaid.

Substituted place for serving notices, &c. on attorneys and solicitors, when their place of abode or business is above a certain distance, &c.

XXXIX. All existing commissions and fiats, when transferred to the Court of Bankruptcy in London, shall be duly entered in the chief registrar's office, in books to be kept for that purpose, and in the country in a book to be kept by the senior registrar of every district court having two registrars, and by the registrar where there is only one.

Existing commissions and fiats, when transferred, to be entered in books, &c.

XL. That in addition to the minutes required to be transmitted to the chief registrar by section 95 of the Bankrupt Law Consolidation Act, the registrars in the country districts (or when there are two registrars, one of them) shall transmit to the chief registrar, between the 1st and 5th day of each month, a return of the proceedings of such court for the last preceding month, in the form set forth in schedule 26, to these orders annexed; and the chief registrar shall cause the same to be minuted in a book to be intituled the "Supplemental Docket Book."

Transmission of minutes of proceedings from the country districts. Sect. 23.

Of the Proceedings.

Proceedings to be on parchment or paper of uniform size, &c.

XLI. All proceedings in the court shall be written or printed on parchment or paper of one uniform size, that is to say, on sheets of sixteen inches in length and ten inches in breadth, without unnecessary alterations or interlineations; and no erasures shall be permitted; except by leave of the Court on special cause shown; in which case any proceedings, though on paper or parchment not of the said size, may be received and filed.

Proceedings to remain of record in the court, and shall not be removed without special direction.

XLII. All proceedings shall remain of record in the court, and shall not be removed, for any purpose whatever, except by special direction thereof, or of the Lord Chancellor.

A registrar to attend in each court, and to take minutes, &c.

XLIII. A registrar shall attend in each court, at such times as the commissioner shall direct, to take and draw up minutes of all proceedings, and such registrar shall have the charge of all such proceedings, under the superintendence of the chief registrar.

Registrar not to sit for commissioner without his request in writing.

XLIV. Except in cases of emergency, the nature whereof shall be entered on the proceedings, no registrar shall sit or act for any commissioner, under section 27, without the express request, in writing, of such or some other commissioner.

Memorandum of advertisement in *Gazette*, &c., when in lieu of copy of *Gazette*.

XLV. In lieu of attaching a copy of the *Gazette* to the proceedings in each bankruptcy or other matter, the registrar shall make a memorandum of the advertisement in the *Gazette*, and of the date thereof, with proper reference to the file to facilitate search; and one copy of every *Gazette* shall be kept in the office of the chief registrar.

Office Copies of Proceedings under Sections 53 and 232.

Charge for office copies under s. 232.

XLVI. That all office copies of fiats, petitions, or other proceedings, books, papers, and writings, or any parts thereof, provided for any bankrupt or arranging debtor, or for any creditor of a bankrupt or arranging debtor, or attorney of any such bankrupt, debtor, or creditor, shall be charged and paid for at

the rate directed by the 53rd section of the Bankrupt Law Consolidation Act, 1849, with respect to the office copies therein mentioned.

XLVII. That all office copies shall be made by the chief registrar or registrar, or by the messenger or usher of the court, as the Court shall appoint, and shall, except as to figures, be fairly written at length, and shall be sealed with the seal of the court, and delivered out by the person appointed, without any unnecessary delay, and in the order in which they shall have been bespoken.

Office copies.
12 & 13 Vict.
c. 106, s. 53.

Duties of the Master.

XLVIII. That the bills to be taxed by the Master, shall be all bills of costs, charges, fees and disbursements in matters of bankruptcy, before the Lord Chancellor, the Lords Justices acting in bankruptcy (as are now taxed by the said Master), and the Court of Bankruptcy in London, and all other taxable bills in other matters in which the Court of Bankruptcy in London may exercise jurisdiction, and such taxable bills as may be specially referred to him for taxation by any District Court of Bankruptcy, subject to the revision of the Court.

Bills to be taxed
by the Master.
12 & 13 Vict.
c. 106, s. 37.

XLIX. That the office of the Master shall be at the Court of Bankruptcy in Basinghall-street, and shall be open for the transaction of business daily, from 10 o'clock in the forenoon until 4 o'clock in the afternoon, except on such days and during such periods as the office of the Accountant in Bankruptcy shall be closed by any order of the Lord Chancellor, or by any general rule or order of the Court.

Office of the
Master.

L. That the business of the Master shall be transacted by him in person.

Business of the
Master to be
transacted by
him in person.

LI. That all copies of bills of costs lodged in the Master's office shall be made, examined, and delivered out by the clerk who has heretofore made, examined and delivered out the same.

Copies of bills.

LII. That in the country districts all bills of costs, charges, Taxation of
bills, &c. in the

country districts.

fees, and disbursements (except such as may be specially referred to the Master), shall be taxed by one of the registrars.

Proof of Debts.

Debts may be proved at sitting for dividend, see sects. 164 and 187.

LIII. That every sitting held for making a dividend of a bankrupt's estate, shall be a sitting for proof of debts, and the notice of such sitting in the *London Gazette* shall express that debts may be proved at such sitting.

Separate debts may be proved under joint petition, and distinct accounts to be kept of joint and separate estate; application thereof in case of overplus.

LIV. That any separate creditor of any bankrupt shall be at liberty to prove his debt under any adjudication of bankruptcy made against such bankrupt jointly with any other person or persons. And under every such adjudication, distinct accounts shall be kept of the joint estate and also of the separate estate or estates of each bankrupt, and the separate estate shall be applied in the first place in satisfaction of the debts of the separate creditors. And in case there shall be an overplus of the separate estate, such overplus shall be carried to the account of the joint estate. And in case there shall be an overplus of the joint estate, such overplus shall be carried to the account of the separate estates of each bankrupt in proportion to the right and interest of each bankrupt in the joint estate. And that the cost of taking such accounts be paid out of the joint and separate estates respectively, as the Court shall direct.

Taking Accounts of Property Mortgaged or Pledged, and of the Sale thereof.

Directions for taking accounts, and sale.

LV. That upon application (which shall be in manner prescribed by Rule XVII.) by any person claiming to be a mortgagee of, or to have security over any part of the bankrupt's estate or effects, real or personal, and whether such mortgage or security shall be by deed or otherwise, and whether the same shall be of a legal or equitable nature, the Court will proceed to inquire whether such person is such mortgagee, or is entitled to such security, and for what consideration and under what circumstances, and if it shall be found that such person is such mortgagee, or is entitled to such security, and no sufficient objection

shall appear to the title of such person to the sum claimed by him, under such mortgage or security, the Court will then proceed to take an account of the principal, interest, and costs due upon such mortgage or security, and of the rents and profits, or dividends, interest or other proceeds received by such person, or by any other person by his order or for his use, in case he shall have been in possession of the property over which the mortgage or security shall extend, or any part thereof, and the Court will then cause notice to be given in the *London Gazette*, and in such other of the public papers as it shall think fit, when and where and by whom, and in what way the said premises or property, or the interest therein so mortgaged, or over which the security shall so extend, are to be sold, and that such sale be made accordingly, and that the assignees (unless it be otherwise ordered) shall have the conduct of such sale; but it shall not be imperative on any such mortgagee to make such application.

LVI. That all proper parties shall join in the conveyance to the purchaser (where necessary) as the Court shall direct.

Conveyance where necessary.

LVII. That the monies to arise from such sale be applied in the first place in payment of the costs, charges, and expenses of the assignees, of and occasioned by the application to the Court, and of and attending such sale, and then in payment and satisfaction of what shall be found due to such mortgagee, or person so having security, for principal, interest, and costs, and that the surplus of the said monies (if any), be paid to the assignees. But in case the monies to arise from such sale shall be insufficient to pay and satisfy what shall be so found due to such mortgagee or person so having security, then he shall be admitted a creditor for such deficiency, and receive dividends thereon rateably with the other creditors, but so as not to disturb any dividend or dividends then already made.

Application of proceeds.

Proof by creditor for deficiency.

LVIII. That for the better making such inquiry and taking such account, and making a title to the purchaser, all parties be examined by the Court upon interrogatories or otherwise as it shall think fit, and produce before the Court upon oath all deeds, papers and writings in their respective custody, or power, relating to the estate or effects of the bankrupt, as the Court shall direct.

All parties to be examined.

Bankrupt's Balance-Sheet.

Bankrupt's balance-sheet must be filed in duplicate ten days before the day appointed for last examination: last examination will not otherwise be passed: office copies of balance-sheet, or any part, to be provided by proper officer. Sect. 160.

LIX. The bankrupt's balance-sheet must be filed in duplicate with the registrar of the court ten days at least before the day appointed for the last examination of the bankrupt, or the adjournment-day thereof for that purpose (one copy for the official assignee, and the other for the proceedings); and the last examination of the bankrupt shall in no case be passed by the Court unless his balance-sheet shall have been duly filed as aforesaid; office copies of the balance-sheet, or such part thereof as shall be required, shall be provided by the proper officer.

Advertisement of Certificate and Transmission to Chief Registrar, and Appeal against Allowance thereof.

Advertisement of certificate. 12 & 13 Vict. c. 106, s. 199.

LX. That the notice of the allowance of a certificate of conformity shall be advertised by the messenger of the court in the *London Gazette* ten days or more before the expiration of the time allowed by the statute for entering an appeal against the allowance, and such notice shall specify the class of the certificate and the time of suspension (if any) and the conditions (if any) annexed to the allowance; and no certificate of conformity shall be delivered to the bankrupt, except on production of the *Gazette* containing such advertisement.

Certificate to be transmitted to chief registrar.

LXI. That after the expiration of the time allowed for entering an appeal against the allowance of a certificate, and on being satisfied that no appeal has been entered, the registrar of the court shall deliver such certificate to the bankrupt, and shall certify the allowance to the chief registrar.

Deposit of costs before application for recall of certificate. Sects. 203, 206, 207, and see sect. 12.

LXII. That before any application for a recall of a certificate, and before or at the time of entering any appeal against the judgment of the Court of Bankruptcy for the allowance of a certificate, or for the refusal, the withholding, or the class of a certificate, or otherwise with respect to a certificate, the creditor or assignee or bankrupt intending to appeal, shall deposit with the chief registrar such sum, not being less than 10*l.* and not exceeding 40*l.*, as the commissioner whose judgment is appealed from, or some other commissioner of the same court acting for

him, shall direct, in order to satisfy (so far as the same may extend) any costs that the appellant may be ordered to pay, and in the absence of any direction of a commissioner as to the amount of deposit, the sum of 20*l.* shall be so deposited.

LXIII. That at the time of entering an appeal against the judgment of the Court for the allowance of a certificate, or for the refusal, the withholding, or the class of a certificate, notice thereof shall be given to the Court by leaving the same in writing with the chief registrar, who shall forthwith enter in the certificate-book the time and nature of every such appeal, and shall afterwards enter in the said book the date and substance of any order made in the said appeal that may be produced before him.

Notice to the Court of an appeal. Sect. 206.

LXIV. That all affidavits to be made in support of petitions of appeal against the allowance, refusal, or withholding of any bankrupt's certificate or the class thereof shall be filed at the time of the filing of such petition of appeal.

Affidavits in support to be filed with petition of appeal.

Audits.

LXV. Every bill of fees and disbursements, and charges of any solicitor or attorney, or messenger, under any commission, fiat, or petition for adjudication of bankruptcy, incurred prior to any sitting for an audit, shall be delivered to the registrar for taxation five days at least before the day appointed for such sitting; and in default thereof, if such sitting shall be adjourned by reason of such default, such solicitor or attorney, or messenger, shall pay the costs occasioned by the adjournment, and the amount thereof shall be deducted from the amount of such bill; and no money shall be paid to any solicitor or attorney, or messenger, on account of any fees or disbursements or charges of any bill, until such bill shall have been taxed.

Bills of solicitors and messengers to be delivered to registrar for taxation five days before the audit: If audit adjourned by default of solicitor or messenger in that behalf, the solicitor or messenger to pay the costs of the adjournment: no sum to be paid

to any solicitor or messenger on account of his bill until it has

been taxed.

LXVI. The audit account of the official assignee, or of any creditors' assignee or assignees, shall be made out in the ordinary form of a debtor and creditor account, each item thereof being entered according to its date, and a name, date, and proper

Audit account of official assignee or creditors' assignee to be made out in a particular

name is not known, by the surname only, or when the Christian name is indicated only by any initial or contraction, then by such initial letter or letters or contraction of the supposed Christian name, and by the surname), and also by the place of residence or business, and shall also contain in the body thereof a statement of the name or names with such initial or initials or contraction as above mentioned, if the name is not known, of all the persons from whom the debt is claimed to be due, whether the whole of them shall be summoned or not, or (in case of partners) the style or firm of partnership and place of business, in the same form as above mentioned.

LXX. The account in such particulars of demand shall be expressed with reasonable and convenient certainty as to dates and all other matters, and where credit is given in such account to the debtor, the notice shall require payment of the difference or balance only which appears to be due in such account.

The account to be expressed with reasonable certainty as to dates, &c., and where credit is given in the account, payment

of the balance only to be required in

the notice.

LXXI. If the affidavit of debt under the said Act shall not be filed within one calendar month after service of the particulars of demand and notice, the plaintiff (or creditor) shall not afterwards be at liberty to proceed without serving new particulars of demand and notice.

If affidavit for summoning debtor not filed within a certain time, fresh particulars of demand and notice required.

LXXII. Every affidavit for summoning a debtor under the said Act shall state the nature of the debt with the same degree of certainty and precision as is now or shall hereafter be required in an affidavit to hold to bail by order of a judge in the superior courts at Westminster.

Affidavit of debt, what certainty required in.

LXXIII. Every summons of a debtor under the said Act shall describe the parties in the same manner as they were described in the particulars of demand and notice.

The parties, how to be described in summons.

LXXIV. Every such summons shall be endorsed with a notice as follows :

Notice to be endorsed on summons in the form given, to make known to the party summoned the provisions of the Act relating thereto. See sects. 78 to 86.

“ Notice to the party summoned.”

This summons is served upon you pursuant to the provisions of the Bankrupt Law Consolidation Act, 1849, and is founded on an

affidavit of debt which was filed in the Court of Bankruptcy in London, or the Court of Bankruptcy for the district, at on the day of 18 .

If you shall fail to appear to this summons at the time and place within specified, having no lawful impediment made known to and proved to the satisfaction of the said Court, and allowed, and if you also fail within seven days after personal service of this summons, or within such enlarged time as the said Court may grant, to pay, secure or compound for the demand within mentioned to the satisfaction of the summoning creditor, or enter into a bond in such sum, and with two sufficient sureties as the Court shall approve of, to pay such sum as shall be recovered in any action which shall have been brought, or shall thereafter be brought for recovery of the same, together with such costs as shall be given in such action, you will be deemed to have committed an act of bankruptcy on the eighth day after the service of this summons, provided a petition for adjudication of bankruptcy shall be filed against you within two calendar months from the filing of the above-mentioned affidavit.

If you shall appear, and on appearance, or at any enlargement or adjournment of the summons, shall refuse to sign an admission of the said demand in the form required by the said Act, and shall not make a deposition on your oath in the form required by the said Act, that you believe you have a good defence upon the merits to such demand or some part thereof, and shall not (if required by the Court so to do) enter into a bond according to the form contained in Schedule K to the said Act annexed, in such sum and with such two sufficient sureties as the Court shall approve of, to pay such sum or sums as shall be recovered, together with such costs as shall be given in any action which shall have been or shall be brought for the recovery of such demand or of any part thereof, in respect of which such deposition shall be made, and shall also fail within seven days after personal service of this summons, or within such enlarged time as aforesaid, to pay, secure or compound as above mentioned, or to enter into such bond as first above mentioned, the same consequence will follow as in the case first supposed, subject to the same proviso as regards the filing a petition for adjudication of bankruptcy.

If you shall appear, and on appearance shall sign and file an admission of the said demand, and shall not within seven days next after the filing of such admission pay or tender and offer to

pay to the said creditor the amount of such demand, or secure or compound for the same to the satisfaction of such creditor, you will be deemed to have committed an act of bankruptcy on the eighth day after the filing of such admission, subject to the same proviso as before mentioned with regard to the filing a petition for adjudication of bankruptcy.

If you shall appear, and on appearance shall sign an admission for part of the said demand, and shall not make a deposition upon oath in the form required by the said Act, that you believe you have a good defence upon the merits to the residue, and shall not (if required by the Court so to do) enter into such bond as aforesaid, to pay such sum or sums as shall be recovered in any action which shall have been brought or shall thereafter be brought for the recovery of such residue, together with such costs as shall be given in such action, then, if as to the sum so admitted you shall not within seven days next after the filing of such admission, pay, or tender and offer to pay to the said creditor the sum so admitted, or secure or compound for the same to the satisfaction of such creditor, and as to the residue of such demand, shall not within seven days from the service of the summons, or such enlarged time as may be granted by the said Court in that behalf, pay, secure or compound for the same to the satisfaction of such creditor, or enter into a bond in such sum, and with such two sufficient sureties as the Court shall approve of, to pay such sum as shall be recovered in any action which shall have been brought or shall thereafter be brought for recovery of the same, together with such costs as shall be given in such action, you will be deemed to have committed an act of bankruptcy on the eighth day after the service of this summons, subject to the same proviso as before mentioned with regard to the filing a petition for adjudication of bankruptcy.

If you shall appear, and on appearance shall, as to the whole of the said demand or part of it, make a deposition on your oath (in the form required by the said Act) that you believe you have a good defence upon the merits to the same and (if required by the Court so to do) enter into such bond according to the form contained in Schedule K in such sum and with such sureties as aforesaid, you will be entitled to a discharge from the summons.

You are, moreover, to observe, that an admission made by you after the service of this summons, though signed elsewhere

than before the Court, may afterwards be filed in court, and will be as effectual as if you had appeared and signed it in court, provided such admission be made in the form contained in Schedule L to the said Act annexed, and there be present at the time of the signature an attorney of one of her Majesty's superior courts of law on your behalf, expressly named by you and attending at your request, to inform you of the effect of such admission before it is signed by you, and provided also that such attorney do subscribe his name to the admission as a witness to the due execution thereof, and in such attestation declare himself to be attorney for you, and state therein that he subscribes as such attorney.

Summons to be endorsed with the name of the attorney suing out the same, or with a memorandum expressing that it was sued out by the creditor in person.

LXXV. Every summons of a debtor under the said Act shall be endorsed with the name and place of business of the attorney actually suing out the same, but *in case no attorney* shall be employed for the purpose, then with a memorandum expressing that the same has been sued out by the summoning creditor "in person."

Summons to be served *four days* before time for appearance.

LXXVI. Every such summons shall be served four days at least before the time for appearance therein mentioned.

Summons to be served between 9 o'clock A.M. and 9 o'clock P.M.

LXXVII. Every such summons shall be served between the hours of nine o'clock in the forenoon and nine o'clock in the afternoon.

If plaintiff makes default in appearance, the defendant entitled to discharge from summons, &c.

LXXVIII. If the plaintiff (or summoning creditor) shall make default in appearance by himself or his attorney at the time appointed in that behalf, the defendant (debtor) shall be entitled to his discharge from the summons, and a memorandum of such discharge shall be endorsed on the summons.

If defendant appear, when in such case entitled to discharge from summons.

LXXIX. If the defendant or party summoned shall appear at the time appointed in that behalf, or at any enlargement or adjournment thereof, and shall refuse to admit such demand, but shall, as to the whole of the said demand, or part of it, make a deposition as required by the said Act, that he believes he has a good defence on the merits to the same or some part thereof, and if ordered by the Court so to do, but not otherwise, enter into such bond according to the form contained in Schedule K in

such sum and with such two sufficient sureties, and within such time as the Court shall approve of and direct, the defendant shall be entitled to his discharge from the summons, and a memorandum of such discharge shall be endorsed on the summons.

LXXX. Any want of compliance on the part of the plaintiff with these rules and orders in the particulars of demand and notice, and in the affidavit for summoning the defendant, and in the summons and service thereof, or in any or either of such matters, may be waived by the defendant, or allowed to be rectified by the Court, when it shall not in the opinion of the Court be matter of substance, or shall have arisen from a mere slip; but unless waived by the defendant, or rectified with the consent of the Court, if the same shall be made known to and proved to the satisfaction of the Court, at the time required by the summons for the appearance of the defendant, it shall be deemed and taken to be a good objection to requiring the defendant to state whether or not he admits the demand sworn to by the plaintiff or any part thereof; and in such case the defendant shall be entitled to his discharge from the summons with costs, and a memorandum of such discharge shall be endorsed on the summons.

Want of compliance with these rules, consequence of.

LXXXI. Every application to enlarge the time for calling on the defendant to state whether or not he admits the demand or any part thereof, or for entering into a bond with sureties, shall be supported by affidavit.

Application to enlarge time.

LXXXII. Before any defendant shall be allowed to enter into a bond with sureties, according to the provisions of the said Act, he shall give to the plaintiff or his attorney two clear days' notice in writing, signed by the defendant or his attorney, of the defendant's intention so to proceed.

Notice to be given of defendant's intention to enter into bond.

LXXXIII. Such notice of sureties shall be accompanied with a true copy of their affidavit of sufficiency, which affidavit shall be in the following form, viz. :—

Notice of sureties to be accompanied with copy affidavit of sufficiency. Form of affidavit of sufficiency.

In the Court of Bankruptcy, London, or in the Court of
Bankruptcy for the district.

Between and

A. B., of in the &c., and C. D., of
&c. [*adding their place of residence and description respectively*],

severally make oath and say, and first the said A. B. for himself saith, that he is one of the proposed sureties for the above-named defendant, and that he the said A. B. resides at aforesaid, and that he is worth property to the amount of £ over and above what will pay and satisfy all his just debts and incumbrances; *that he is not surety in any manner for the above-named defendant or any other person, except on the present occasion* [or if he is surety on any other occasion, substitute for the words in italics, the following: “*and every other sum for which he is now surety*”]; that his, the said A. B.'s property, to the amount aforesaid, consists of [*here specify the nature and value of the property, according to the circumstances of the case, as follows*]: stock in trade in his business of a carried on by him at of the value of of good book-debts, owing to him to the amount of furniture in his house at of the value of of a freehold or leasehold farm of the value of situate at occupied by [*or of other property, particularizing each description of property, with the value thereof*]. And the said A. B. further saith, that for the last six months he has resided at aforesaid [*or if he has resided at several places, then say, at the following places, particularizing them*]. And the above-named deponent, C. D., for himself saith, that [*here pursue the same form as with respect to the former surety*].

Sureties to justify in what amount.

LXXXIV. The amount of property so sworn to shall be at least equal to the sum demanded or the portion thereof for which the bond is ordered to be given [*fractional parts of a pound excepted*], and one-fourth more.

Liberty to except to sureties.

LXXXV. The plaintiff shall be at liberty, within four days after service of notice of sureties, to except to the proposed sureties, or either of them, by delivering a written notice to the defendant or his attorney, to the effect generally that he excepts to such surety or sureties [*as the case may be*], and a copy of such notice shall be served on the registrar of the court in which such exception is to be heard, two days at least before the day of hearing.

Attendance in court to justify

LXXXVI. Two days after service of such notice of exception, the defendant or his attorney shall attend before the commis-

sioner of the day in London at three o'clock in the afternoon, or if in the country, at such time as the Court shall appoint, with the bond duly stamped, and with an affidavit by the subscribing witness of the execution of such bond, and the plaintiff or his attorney shall be at liberty to oppose the sureties, or either of them, upon affidavit, or on the ground of any defect appearing on the face of the proceedings.

and opposition thereto.

LXXXVII. The bond shall in all cases be taken in a penal sum to the amount of double the sum demanded, or the part thereof in respect of which the bond is to be given, up to the sum of 1,000*l.*; and beyond 1,000*l.* in the sum of 1,000*l.* beyond the sum demanded.

Penalty of the bond and form of.

The condition of the bond is to be according to the form contained in Schedule K to the said Act.

LXXXVIII. Where no notice of exception is served, the defendant or his attorney shall attend before the commissioner of the day on the sixth day after service of notice of sureties, at eleven o'clock in the forenoon in London, or if in the country, at the hour appointed by the Court, with the bond and affidavit of execution aforesaid, and also with an affidavit of service of notice of sureties, and an office copy of the affidavit of sufficiency.

Where no notice of exception, course of proceeding.

Arrangements between Debtors and their Creditors, under the superintendence and control of the Court.

LXXXIX. That every petition shall be delivered fairly written or printed on parchment, properly stamped, between the hours of eleven and two, to the registrar of the day in London, or to the registrar or one of the registrars in the country (as the case may be in town or in country), who shall file and number such petition, and allot the same by ballot, in the presence of a commissioner, to one of the commissioners of the Court of Bankruptcy in London (or to a commissioner in the country where there are two commissioners), and forthwith certify to such commissioner the filing of the petition and the allotment to him, and the petition shall be prosecuted before such commissioner (or before the sole commissioner where there is only one): Provided always, that any one commissioner of the same court may, in the absence of

Presentation and allotment of petitions. 12 & 13 Vict. c. 106, ss. 211 to 223.

any other commissioner, act for him : Provided also, that where a petition shall have been previously filed by the same petitioner, whether the same shall have been dismissed or not, or when the petitioner has previously been bankrupt in London, or within the same district in the country, the new petition shall be allotted to the same commissioner to whom the former petition, commission, fiat, or petition for adjudication was allotted.

Two copies to be delivered to registrar.

XC. That two fair copies on paper of the petition shall be delivered to the registrar, together with the original petition ; one for the use of the commissioner, the other for the use of the official assignee and for the inspection of creditors.

Deposit with official assignee.

XCI. That the sum of 10*l.*, or such other sum, not exceeding 30*l.*, as the commissioner shall direct, shall, before the appointment of any sitting of the Court under such petition, be deposited with such official assignee of the commissioner to whom the petition shall be allotted, as he shall direct, for the costs of the sitting or sittings, for the payment of such remuneration to the official assignee as the commissioner shall award for the examination of the accounts, and for other necessary expenses, and the residue, if any, shall be repaid to the petitioner.

Certificate of causes of detention to be annexed to petition.

XCII. That in all cases where a petitioner shall be in custody, there shall be filed with his petition a certificate from the gaoler or officer, of the cause or causes of the detention of the petitioner.

Sending and serving of notices.

XCIII. That all notices required by or given in pursuance of the provisions of the Act with respect to the said arrangements, except where otherwise directed by the Act, or by the Court, shall be sent or served [*as the case may require*] by a messenger of the Court.

Petitioner's account to be attested and furnished to official assignee.

XCIV. That the account to be filed by the petitioning trader shall be signed in the presence of and attested by a solicitor of the Court of Bankruptcy, and that the copy to be furnished to the official assignee shall be so furnished ten days or more before the day appointed for the private sitting of the Court.

XCV. That no person not being or not claiming to be a creditor, or the solicitor or duly authorized attorney of a creditor, except the official assignee and one clerk, and the petitioner, accompanied by two persons, shall be present at any sitting, or be permitted to inspect the petition or other proceedings, unless authorized in writing by the commissioner.

Right to attend
sittings and in-
spect proceed-
ings.

XCVI. That the minutes or notes of the proceedings at every sitting shall be kept by the registrar.

Minutes of
sittings.

XCVII. That every affidavit in the matter of an arrangement under the superintendence and control of the Court, made after the allotment of a petition, shall be intituled "The Court of Bankruptcy in London," or "The Court of Bankruptcy for the District" (as the case may be), "In the Matter of a Petition for Arrangement between A. B. and his creditors."

Title of
affidavits.

XCVIII. That the several forms in the following schedule marked A, shall be used, with the necessary variations.

Forms.

SCHEDULE A.

FORM OF ORDER

FOR PROTECTION TO PETITIONING TRADER, UNDER SECTION 211.

The Bankrupt Law Consolidation Act, 1849.

Court of Bankruptcy, Basinghall-street, London [*or*,
at in the county of], the day
of in the year of our Lord one thousand
eight hundred and

WHEREAS, of a
trader, unable to meet his engagements with his creditors, did
on the day of present his petition to this honourable
Court, under the provisions of the Bankrupt Law Consolidation
Act, 1849, praying that his person and property might be pro-
tected from all process, and that such proposal as he might be
able to make, or such modification thereof, as by three-fifths in
number and value of his creditors might be determined, might be
carried into effect under the superintendence and control of this
honourable Court; and there was filed with the said petition

ORDER OF RELEASE.

such affidavit in support thereof as is required by the said Act. Now, I, one of the commissioners of the said Court, acting in the matter of the said petition, do hereby, in pursuance of the said statute, order that the person and property of the said

shall be protected from all process from the date hereof until the day of next at noon, or until further order.

Given under my hand and the seal of the Court this
day of 18 .

Commissioner.

FORM OF RENEWAL

OF PROTECTION, TO BE ENDORSED ON THE ORIGINAL ORDER FOR PROTECTION.

Court of Bankruptcy, Basinghall-street, London [*or*,
at in the county of] the day
of in the year of our Lord one thousand
eight hundred and

I, one of the commissioners of the Court of Bankruptcy in London [*or*, for the district], authorized to act in the matter of the within petition, do hereby renew the protection within granted, and order that the person and property of the said
shall be protected from all process from the date hereof until the
day of next at noon, or until further order.

Given under my hand and the seal of the Court the
day of 18 .

Commissioner.

ORDER OF RELEASE

OF PETITIONING TRADER FROM CUSTODY, UNDER SECT. 211.

The Bankrupt Law Consolidation Act, 1849.

Court of Bankruptcy, Basinghall-street, London [*or*,
at in the county of] the day
of in the year of our Lord one thousand
eight hundred and

WHEREAS, of a trader unable
to meet his engagements with his creditors, did on the day

of present his petition to this honourable Court, under the provisions of the Bankrupt Law Consolidation Act, 1849, praying that his person and property might be protected from all process, and that such proposal as he might be able to make (or such modification thereof as by three-fifths in number and value of his creditors might be determined) might be carried into effect under the superintendence and control of this honourable Court acting in the matter of the said petition, and whereas I have made an order, bearing date this day [or, the day of], that the person and property of the said shall be protected from all process from the date thereof until the day of next at noon, or until further order; and whereas it appears that the said is in prison for debt; namely, in the prison of under an execution upon a judgment obtained on the day of in the court of against the said at the suit of for the sum of £ and interest thereon [*the statement of the cause of the petitioner's imprisonment or custody to be varied according to the facts*], and it does not appear by any judgment, order, commitment or sentence, under which the said petitioner is in prison or in custody, or by the record or entry of any such judgment, order, commitment or sentence, that he is in prison or in custody for any debt contracted by fraud or breach of trust, or by reason of any prosecution against him whereby he had been convicted of any offence, or for any debt contracted by reason of any judgment in any proceeding for breach of the revenue laws, or in any action for breach of promise of marriage, seduction, criminal conversation, libel, slander, assault, battery, malicious arrest, malicious trespass, maliciously suing out a fiat in bankruptcy, or maliciously filing or prosecuting a petition for adjudication of bankruptcy: Now I do hereby order the sheriff of [*the person having the petitioner in prison or custody*] and every person who shall have the said in custody by virtue of the said execution, to release the said from custody as to such execution, pursuant to the said statute.

Given under my hand and the seal of the Court this day
of in the year of our Lord 18 .
 Commissioner.

CERTIFICATE OF APPROVAL

OF RESOLUTION ACCEPTING PETITIONING TRADER'S PROPOSAL,
SECT. 216.

The Bankrupt Law Consolidation Act, 1849.

Court of Bankruptcy, Basinghall-street, London [*or*,
at in the county of], the day
of 18 .

WHEREAS, of a trader unable to meet his engagements with his creditors, did, on the day of present his petition to this honourable Court under the provisions of the Bankrupt Law Consolidation Act, 1849, praying that such proposal as he might be able to make (or such modification thereof as by three-fifths in number and value of his creditors might be determined), might be carried into effect, under the superintendence and control of the said Court; and whereas one of the commissioners of the said court acting in the matter of the said petition, caused such sittings of the Court to be held as are directed by the said Act; and whereas a certain resolution or agreement now exhibited and marked with the letter was duly assented to at such sittings, which I, a commissioner acting in the matter of the said petition, and after hearing

do think reasonable and proper to be executed under the direction of this Court, and have approved and confirmed the same, and caused it to be filed and entered of record in the said court; I do hereby certify the several matters aforesaid under my hand and the seal of the Court this day of in the year of our Lord 18 .

Commissioner.

PROTECTION FROM ARREST,

TO BE ENDORSED ON THE FOREGOING CERTIFICATE.

THE within-named is hereby protected from arrest at the suit of any person being a creditor at the date of his petition, and having had such notice or notices as by the within-mentioned Act is required, until the day of 18 at noon,

Commissioner.

TO BE FILED BY PETITIONING TRADER, UNDER 12 & 13 VICT.
C. 106, SECT. 214.

Court of Bankruptcy, Basinghall-street, London [*or*,
at in the county of], the day
of in the year of our Lord 18 .

Witness my hand the day of one thousand
eight hundred and

Signed by the said }
in }
the presence of }
Solicitor.

CREDITORS.

No.	Names, Residences, and Occupations of Creditors.	Amount.			When Contracted.	Nature and considera- tion of the Debt and Securities, if any, and estimated Value of such Securities.
		£.	s.	d.		

Note.—When the Name and Residence (or either of them) of any Indorser or Holder of any negotiable Security are unknown, that fact must be stated.

DEBTORS.

N.B.—Where there are Cross Demands, the party must be entered both as Creditor and Debtor, and “ Set Off ” must be written under the Amount.

No.	Names, Descrip- tions, and Places of Abode of Per- sons from whom Debts and Rights are due to the Petitioner, or claimed by him.	Amount.			When con- tracted.	Good, Bad, or Doubt- ful.	Nature and Con- sideration of the Debt, also Secu- rities, if any, for the same, and the estimated Value of such Securities.	Witnesses, with their Residences, and other Evidence by which the Debt may be proved.
		£.	s.	d.				

PROPERTY IN POSSESSION.

Real and Personal Estates and Effects, which were at or since the time of filing my petition, or are now in my possession, enjoyment, or control, or which were or are held by any other person or persons in trust for my use, or to the possession or enjoyment of which I was entitled at the time of subscribing my petition, or am now entitled.

1. Interest in Lands.	Freehold, Copyhold, and Leasehold Property, with local description, Names of Tenants, and Annual Rent of the same, and state- ment of Incumbrances (if any) thereupon, with the Dates thereof	£.	s.	d.
2. Personal Property.	Household Goods and Furniture, at Wearing Apparel..... Jewels, Trinkets, and Ornaments of the Person Plate, Linen, and China Wines and other Liquors Books, Prints, and Pictures..... Horses, Cows, and other Animals Carriages Farming Stock and Implements of Hus- bandry Stock in Trade, in my business of Machinery and Utensils in my business of . Ships and Shares of Ships: viz.....	£		

3. Property in the Funds, Annuities, Shares, &c.	Annuities, Money in the Public or other Funds, Shares in Canal or other Compa- nies ; showing in whose names the same are standing ; also when and by whom the last Dividend or other Payment was re- ceived in respect of the same.	£.	s.	d.
4. Unpaid Legacies.	Legacies due, but unpaid ; with all particu- lars concerning the same			
		£		
Books, Deeds, Papers.	The following is a true List of all Books, Papers, Deeds, and Writings relating to my Estate and Effects, or any part there- of, which, at the time of presenting my petition, were, or at any time since have been in my possession, or under my custody or control, or in the possession or custody of any person in trust for me, or for my use, benefit, or advantage.			

PROPERTY

IN REVERSION, REMAINDER, OR EXPECTANCY ; PLACES, PENSIONS, RIGHTS,
AND POWERS.

N.B.—Contingent as well as Vested Interests must be entered.

Real and Personal Estates and Effects in which I had or have any Interest
in Reversion, Remainder, or Expectancy.

1. Interest in Land.	Freehold, Copyhold, and Leasehold Property, with Names and Descriptions of Persons now enjoying the same, and the Annual Value thereof ; also the nature of my Interest therein, and from whom, and in what manner it is derived.....	Supposed Value of my Interest if now to be sold.		
		£.	s.	d.
2. Personal Property.	Personal Property, with Names and Descriptions of Persons now enjoying the same ; also the nature of my Interest therein, and from whom, and in what manner it is derived			
3. Property in the Funds, Annuities, Shares, &c.	Annuities, Money in Public or other Funds, Shares in Canal and other Companies ; showing in whose Names the same are standing, with Names and Descriptions of Persons now enjoying the same ; also the nature of my Interest therein, and from whom and in what manner it is derived ..			
		£		

Places and Pensions in Possession or Reversion.	Places of Benefit or Advantage held by me, with the Salaries, Fees, and Emoluments thereof; also all Pensions and Allowances in Possession or Reversion held by me, or by any other Person or Persons for me or on my behalf, or of and from which I derive or may derive any benefit or advantage	Supposed Value of my Interest if now to be sold.		
		£.	s.	d.
Rights and Powers.	Rights and Powers which I or any other Person or Persons in Trust for me, or for my Use, Benefit, or Advantage, or am or were or are in any manner seised or possessed of, or interested in or entitled to, or which I, or any other Person or Persons in Trust for me, or for my Benefit, had or have any power to dispose of, charge, or exercise for my Benefit or Advantage			
		£		

Witness my hand, the
eight hundred and

day of

one thousand

Signed by the said

in the presence of

Solicitor.

Arrangement by Deed. Sections 224 to 229.

XCIX. That a certificate of the trustee or inspector, or of two creditors, of the execution of the deed or memorandum of arrangement by the requisite number of creditors, and the account to be appended thereto, and affidavit verifying the same, and the certificate to be granted by the Court, shall be in the following forms, with the necessary variation.

Forms of
certificates,
account and
affidavit, under
12 & 13 Vict.
c. 106, ss. 225,
226, 227.

FORM OF CERTIFICATE

BY TRUSTEE OR INSPECTOR.

The Bankrupt Law Consolidation Act, 1849.

To the Court of Bankruptcy in London [*or*, to the
Court of Bankruptcy for the district].

I, the undersigned being the trustee [*or*, inspector],
[*or*, we the undersigned and being the
trustees] [*or*, inspectors] under a deed [*or*, memorandum] of
arrangement now produced, and bearing date the day of
 and made between [*state the parties to the deed or
memorandum*], being a deed [*or*, memorandum] of arrangement
between the said and his creditors, within the
meaning of the provisions of the Bankrupt Law Consolidation Act,
1849, with respect to arrangements by deed, Do hereby certify to
the Court of Bankruptcy in London [*or*, to the Court of Bankruptcy
for the district], that the said deed [*or*, memo-
randum] has been signed by or on behalf of six-sevenths in number
and value of the creditors of the said whose debts
amount to 10*l.* and upwards, accounting every creditor a creditor
in value in respect of such amount only as, upon an account
fairly stated, after allowing the value of mortgaged property, and
other such available securities or liens from the said
appeared to be the balance due to such creditor. And that a full
account of the debts of the said together with the
names, residences, and occupations of his creditors, is appended
hereto.

Dated this day of 18 .

A. B.

FORM OF CERTIFICATE

BY TWO CREDITORS OF THE TRADER.

The Bankrupt Law Consolidation Act, 1849.

To the Court of Bankruptcy in London [*or, to the*
Court of Bankruptcy for the district].

WE, the undersigned A. B. of and C. D. of
being two of the creditors of the trader herein-
after mentioned, and there being no trustees or inspector under
the deed [*or, memorandum*] of arrangement hereinafter men-
tioned, Do hereby certify to the Court of Bankruptcy in London
[*or, to the Court of Bankruptcy for the* district]
that a deed [*or, memorandum*] bearing date the day of
 and made between [*state the parties to the deed*
or memorandum], being a deed [*or, memorandum*] of arrange-
ment between the said and his creditors within
the meaning of the provisions of the Bankrupt Law Consolida-
tion Act, 1849, has been signed by or on behalf of six-sevenths
in number and value of the creditors of the said
whose debts amount to 10*l.* and upwards, accounting every
creditor a creditor in value in respect of such amount only
as, upon an account fairly stated, after allowing the value of
mortgaged property, and other such available securities, or liens
from the said appeared to be the balance due to
such creditor. And that a full account of the debts of the said
 together with the names, residences, and
occupations of his creditors, is appended hereto.

Dated this day of 18 .

E. F.
G. H.

FORM OF THE ACCOUNT

TO BE APPENDED TO THE CERTIFICATE OF TRUSTEE, OR INSPECTOR, OR
TWO CREDITORS.

N.B.—This is to be an account of all the debts of the trader, including those under 10*l.* and including debts secured, and showing the estimated value of any security.

The Bankrupt Law Consolidation Act, 1849.

A FULL ACCOUNT OF THE DEBTS OF
together with the Names, Residences, and Occupations of his Creditors.

Amount of Debts.	CREDITORS.			Debts wholly or partially secured by mortgage or other such available securities or liens, showing the amount secured and the value or estimated value of the security.
	Names.	Residences.	Occupations.	
£500	John Smith . .	10, Fore-street, London	Merchant	£250, part of the debt secured by mortgage of freehold premises in Street, London, dated the 1st day of January, 1840. The estimated value of the premises is £300.
£4. 10. 6.	William Roberts	50, Cheapside, London	Tailor	

Form of Affidavit of the Trader to accompany the Certificate.

The Bankrupt Law Consolidation Act, 1849.

In the Court of Bankruptcy in London [*or*, Court of Bankruptcy
for the district].

In the matter of an arrangement by deed between I. K. and his
creditors.

THE abovenamed I. K. of maketh oath, and
saith that he hath perused the accompanying certificate purport-
ing to be signed by bearing date the day of
and the account appended thereto, and purporting to
be a full account of the debts of this deponent, together with the
names, residences, and occupations of this deponent's creditors.
And this deponent saith that the said account and the matters
therein stated are true, and that the said account is a full
and true account of the debts of this deponent, together with
the names, residences, and occupations of this deponent's credi-
tors. And this deponent saith that he is acquainted with the hand-
writing of the said and the signature to the said
certificate is in the handwriting of the said
and that the contents of the said certificate are true.

*Form of Certificate by the Court of Execution by requisite
proportion of Creditors.*

The Bankrupt Law Consolidation Act, 1849.

Court of Bankruptcy, Basinghall-street, London [*or*, at
in the county of the day of
in the year of our Lord 18].

In the matter of an arrangement by deed between I. K. and his
creditors.

UPON reading the petition of the abovenamed I. K. to this
Court, and the affidavit [*or*, affidavits] in support thereof, and of
the due service of the notices required by this Act, and upon
hearing and being satisfied that the said
I. K. being a trader liable to become a bankrupt, has suspended
payment, and that he did for six months next immediately pre-
ceding his suspension of payment reside [*or*, carry on business]

within the district of this Court, and that a deed [*or, memorandum*] now exhibited, and marked with the letter and bearing date the day of and made between [*state the parties to the deed or memorandum*] being a deed [*or, memorandum*] of arrangement between the said and his creditors, within the meaning of the provisions of the Bankrupt Law Consolidation Act, 1849, with respect to arrangements by deed, has been signed by or on behalf of six-sevenths in number and value of the creditors of the said I. K., whose debts amounted to 10*l.* and upwards, accounting every creditor a creditor in value in respect of such amount only as upon an account fairly stated, after allowing the value of mortgaged property and other such available securities or liens from the said I. K. appeared to be the balance due to such creditor; I hereby certify the same under my hand and the seal of the Court. Dated this
day of 18 .

A. B., Commissioner.

Orders for Payment of Money and Costs, and Execution thereon.
Sections 123, 132, 151, and 249.

C. That every order for payment of money and costs, or either of them, shall be signed by the commissioner making such order, and be sealed with the seal of the Court, and be countersigned by the registrar, or one of the registrars, and shall be forthwith filed with the proceedings.

Order for payment of money for costs. 12 & 13 Vict. c. 106, ss. 123, 132, 151, and 249.

CI. That every order for payment of costs shall contain a direction that the party in whose favour the order is made may enforce the same by issuing execution.

Order for costs to contain leave to issue execution.

CII. That the costs directed by any such order to be paid shall be taxed on production of an office copy of such order, and the allocatur being duly stamped shall be signed and dated by the master or registrar taxing the costs.

Taxation of costs.

CIII. That in all cases where writs of execution may be issued out of the Court of Bankruptcy to enforce an order for payment of money and costs, or either of them, the same shall be sealed with the seal of the Court, and be issued by the chief registrar

Chief registrar to issue execution.

on production of an office copy of the order for payment and [where the order comprises costs] on production of the allocatur.

Præcipes to be filed.

CIV. That at the time of issuing any writ of execution the solicitor causing the same to be issued shall file a *præcipe* thereof with the chief registrar in the form given in the schedule to these orders.

Præcipe book to be kept.

CV. That the chief registrar shall file and keep every such *præcipe*, and shall keep a book in which he shall enter the same, with an index referring alphabetically to the names of the persons against whom writs are issued.

Form of writs of execution and of the execution thereof.

CVI. That writs of execution shall be in the forms given in the following schedule, or as near thereto as the circumstances of the case may require, and such writs when sealed shall be delivered to the sheriff or other officer to whom the execution of the like writs issuing out of the Superior Courts of Common Law belongs, and shall be executed by such sheriff or other officer as nearly as may be in the same manner in which he doth or ought to execute such like writs, and for the execution of such writs such sheriff or other officer shall not take or be allowed any fees other than such as are or shall be from time to time allowed by lawful authority for the execution of the like writs issuing out of the Superior Courts of Common Law.

Teste and return.

CVII. That writs of execution shall be tested in the name of the senior commissioner and of the day when actually issued, and be made returnable immediately after the execution thereof, before the Court of Bankruptcy in London.

Indorsement of amount.

CVIII. That the amount actually intended to be levied or extended, or for which the person is to be taken, and the name, occupation, and address of the person against whom the writ is issued, and the name and residence, or place of business of the solicitor issuing the same shall be indorsed on every writ of execution.

Venditioni exponas.

CIX. That on the filing of a return to a former writ that goods have been seized but not sold, a writ of *venditioni exponas* may be issued.

CX. That on execution of the writ, or before execution, if so ordered by the Court of Bankruptcy in London, every writ shall be forthwith returned to the said Court of Bankruptcy, by filing the same [*with the proper return endorsed*] with the chief registrar, by whom such writ and return shall be filed of record, and the fact, and date, and substance of the return, shall be forthwith entered in the *præcipe* book.

Returns to be filed with chief registrar and entered in *præcipe* book.

CXI. That on satisfaction by levy or otherwise, in whole or in part, the party on whom the order is made may, on delivery of a search stamp, cause such satisfaction to be entered on the order for payment.

Entry of satisfaction.

CXII. That unless such satisfaction shall appear by the return of the writ, or shall be admitted by the party in whose favour the order shall be made, or his solicitor, application must be made to the Court of Bankruptcy wherein the proceedings and order shall be filed to order such entry of satisfaction.

Order for entry of satisfaction.

CXIII. That the Court of Bankruptcy shall, on proper application, exercise such and the same powers of amendment of writs of execution, and the indorsement thereon, and the *præcipes* thereof, in cases where such powers may be reasonably exercised, and on the same terms as to payment of costs or otherwise, as the Superior Courts of Westminster are in the habit of exercising.

Amendment of writs, &c.

Form of Præcipe on issuing Execution.

SURREY. *Fi. Fa., Ca. Sa. Elegit, or Venditioni exponas* [*as the case may be*], against C. D. for payment of £
and £ costs [*as the case may be*] to A. B.
official assignee of [*omit this if not applicable*],
on order of the Court of Bankruptcy in London [*or, for the*
district]. Dated the day of in the
year of our Lord 18 .

E. F. [*solicitor issuing the writ*].
Address
Date

Witness [*name of senior commissioner*] at Basinghall-street, in
the city of London, the day of
in the year of our Lord 18 .

No. 2.

*Writ of Fieri facias on an Order for Payment by Instalments of
Debt admitted in Court to be due to the Estate of a Bankrupt.*

VICTORIA, by the grace of God, of the United Kingdom of
Great Britain and Ireland, Queen, Defender of the Faith. To
the sheriff of greeting: Whereas by an order
made in the Court of Bankruptcy in London [*or, for the*
district], bearing date the day of in the
year of our Lord 18 entitled, In the matter of
[*insert the title of the order*], and reciting that C. D., of
in his examination taken the day of and
signed and subscribed by the said C. D., had admitted that he was
indebted to the said bankrupt in the sum of £ To be varied
upon the balance of accounts between the said C. D. and the said according to
bankrupt, it was ordered that the said C. D. should pay to A. B., the facts of the
the official assignee of the estate and effects of the said bankrupt, case.
in full discharge of the said sum of £ the sum of £
in manner following; that is to say, by instalments of
£ each, the first whereof was to be made on the
day of And it was ordered, that in default of
payment of any of the said instalments, the whole sum then re-
maining unpaid should immediately become payable and be paid.
And whereas we are given to understand that default was made in
payment of one of the said instalments, and thereupon the said
sum of £ which then remained unpaid [*or the*
sum of £ being the portion of the sum so ordered
to be paid, which then remained unpaid, according to the facts]
immediately became payable, but the same has not been paid.
Therefore we command you, that of the goods and chattels of the
said C. D. in your bailiwick, you cause to be made the said sum
of £ [*insert here the sum to be levied*], and that
of the goods and chattels of the said C. D. in your bailiwick,
you further cause to be made interest [*proceeding as in the*
former form].

No. 3.

Writ of Fieri facias on an Order for Payment of Debt admitted in Court to be due to the Estate of a Bankrupt, and of Costs assessed by the Court.

VICTORIA, by the grace of God [*as in the forms given above, reciting the order, including the portion of it relating to costs*]. And whereas we are given to understand that the said sums of £ and £ are still unpaid [*make this agree with the facts*]. Now we command you, that of the goods and chattels of the said C. D. in your bailiwick, you cause to be made the said sums of £ and £ [*proceed as in the above forms, with the necessary variations*].

No. 4.

Writ of Fieri facias on an Order for Payment of Costs to be taxed.

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To the sheriff of greeting: We command you that of the goods and chattels of C. D. in your bailiwick you cause to be made the sum of £ for certain costs which lately before our Court of Bankruptcy in London [*or, for the district*] by an order made in a certain matter there, entitled, In the matter of [*insert the title of the order*], bearing date the day of were ordered to be paid by the said C. D. to A. B., official assignee of the estate and effects of [*omit this if not applicable, and alter the form to suit the facts of the case*], which costs have been since taxed at the said sum of £ as appears by an allocatur dated the day of and that of the goods and chattels of the said C. D. in your bailiwick you further cause to be made interest at the rate of 4*l.* per centum per annum on the said sum from the said date of the said allocatur. And that you have that money and interest before our Court of Bankruptcy at Basinghall-street, in the city of London, immediately after the execution hereof, to be paid to the said A. B. in pursuance of the said order. And that you do all such things as by the statute

passed in the year of our Lord 1838 you are authorized and required to do in this behalf. And in what manner you shall have executed this our writ make appear to our said Court in London immediately after the execution thereof. Witness

[*name of the senior commissioner*] at Basinghall-street, in the city of London, on the day of in the year of our Lord 18 .

No. 5.

Writ of Capias ad satisfaciendum on an Order for Payment of Debt admitted in Court to be due to the Estate of a Bankrupt.

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To the sheriff of greeting [*recite the order for payment, and that the money continues unpaid, as in the form of fieri facias above given, and proceed*]. Now we command you that you take the said C. D., if he shall be found in your bailiwick, and him safely keep, so that you may have his body immediately after the execution hereof before our Court of Bankruptcy in London, to satisfy the said A. B., official assignee as aforesaid, the said sum of £ and further to satisfy the said A. B., official assignee as aforesaid, interest upon the said sum of £ at the rate of 4*l.* per centum per annum, from the said date of the said order, and have there then this writ. Witness
[*name of senior commissioner*], at Basinghall-street, in the city of London, the day of in the year of our Lord 18 .

No. 6.

Writ of Venditioni exponas.

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To the sheriff of greeting: Whereas by our writ we lately commanded you that of the goods and chattels of C. D. [*here recite the mandatory part of the fieri facias to the end*], and on the day of you returned to our said Court

of Bankruptcy in London, that by virtue of the said writ to you directed you had taken goods and chattels of the said C. D. to the value of the money and interest aforesaid, which said goods and chattels remained in your hands unsold for want of buyers [*to be varied according to the actual return*]. Therefore we, being desirous that the said A. B. should be satisfied the money and interest aforesaid, command you that you expose to sale, and sell or cause to be sold the goods and chattels of the said C. D. by you in form aforesaid taken, and every part thereof, for the best price that can be gotten for the same, and have the money arising from such sale before our said Court of Bankruptcy at Basinghall-street, in the city of London, immediately after the execution hereof, to be paid to the said A. B., and have there then this writ. Witness at Basinghall-street, in the city of London, the day of in the year of our Lord 18 .

No. 7.

Writ of Elegit on an Order for Payment of Debt admitted in Court to be due to the Estate of a Bankrupt.

VICTORIA, &c.—To the sheriff of greeting.

Whereas [*recite the order for payment, and that the money continues unpaid, as in the form of fieri facias above given, and proceed*]; and afterwards the said A. B. came into our said Court of Bankruptcy, and according to the form of the statute in such case made and provided, chose to be delivered to him, her, or them [*as the case may be*] all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments, of copyhold or customary tenure in your bailiwick, as the said C. D. or any one in trust for him, was seised or possessed of on the day of in the year of our Lord (a), or at any time afterwards, or over which the said C. D., on the said day of (b), or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said

(a) The day on which the order was made.
(b) The day on which the order was made.

lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said sum of £ shall have been levied. Therefore we command you, that without delay you cause to be delivered to the said A. B. by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough; and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold and customary tenure in your bailiwick, as the said C. D. or any person in trust for him, was seised or possessed of on the said

day of (c) or at any time afterwards, or over which (c) The day on which the order was made.

the said C. D. on the said day of (d) (d) The day on which the order was made.

or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit, to hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns until the said sum of £ shall have been levied.

And in what manner you shall have executed this our writ make appear to us in our Court of Bankruptcy aforesaid immediately after the execution thereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement. And have there then this writ.

Witness

No. 8.

Writ of Elegit on an Order of the Court of Bankruptcy for payment of Debt admitted in Court to be due to the Estate of a Bankrupt, and of Costs assessed by the Court.

VICTORIA, &c.—To the sheriff of greeting :

Whereas [*recite the order for payment, including the portion of it relating to costs, and that the monies are unpaid, as before, and proceed*]: And afterwards the said A. B. came into our said Court of Bankruptcy, and according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough; and also all such lands,

tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure in your bailiwick as the said C. D. or any one in trust for him, was seised or possessed of on the day of in the year of our Lord (a), or at any time afterwards, or over which the said C. D. on the said day of (b), or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit; to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of £ and £ together with interest upon the said sum of £ at the rate of 4l. per centum per annum from the day of (c), and on the said sum of £ at the rate aforesaid, from the day of (d) shall have been levied: Therefore we command you that without delay you cause to be delivered to the said A. B. by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough; and also all such lands and tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D. or any person or persons in trust for him was or were seised or possessed of on the said day of (e), or at any time afterwards, or over which the said C. D. on the said day of (f), or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit; to hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of £ and £ together with interest aforesaid, shall have been levied. And in what manner you shall have executed this our writ make appear to us in our Court of Bankruptcy aforesaid immediately after the execution thereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement. And have there then this writ.

Witness

No. 9.

Writ of Elegit on an Order for Payment of Costs to be taxed.

VICTORIA, &c.—To the sheriff of greeting:

Whereas lately, in our Court of Bankruptcy, in a certain matter there depending, intituled, In the matter of E. F., by an order of our said Court made in the said matter and bearing date the day of it was ordered that C. D. should pay unto A. B. certain costs as in the said order mentioned, and which costs have been taxed and allowed by G. H., Esq., the Master of our said Court, at the sum of £ as appears by the certificate of the said Master, dated the day of

And afterwards the said A. B. came into our said Court of Bankruptcy, and according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any one in trust for him, was seised or possessed of, on the day of in the year of our Lord (a) or at any time afterwards, or over

year of our Lord (a) or at any time afterwards, or over (a) The date of
which the said C. D. on the said day of (b) or at the allocatur.
any time afterwards, had any disposing power, which he might, (b) The date of
without the assent of any other person, exercise for his own the Master's
certificate of
taxation.

beneft; to hold to him the said goods and chattels, as his
proper goods and chattels, and to hold the said lands, tenements,
rectories, tithes, rents, and hereditaments respectively, according
to the nature and tenure thereof, to him and to his assigns, until
the said sum of £ together with interest thereon at
the rate of 4l. per centum per annum, from the said day
of (c) shall have been levied. Therefore we command

of (c) shall have been levied. Therefore we command (c) The date of
you that without delay you cause to be delivered to the said A. B. the allocatur.

by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough; and also all such lands and tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person or persons in trust for him, was or were seised or possessed of on the said day of (d) or at

(d) The date of the allocatur.

any time afterwards, or over which the said C. D., on the said
 (e) The date of day of (e), or at any time afterwards, had any
 the allocatur. disposing power, which he might, without the assent of any
 other person or persons, exercise for his own benefit; to hold
 the said goods and chattels to the said A. B. as his proper goods
 and chattels, and also to hold the said lands, tenements, rec-
 tories, tithes, rents, and hereditaments respectively, according to
 the nature and tenure thereof, to him and to his assigns, until
 the said sum of £ together with interest as aforesaid,
 shall have been levied. And in what manner you shall have
 executed this our writ, make appear to us in our Court of
 Bankruptcy aforesaid, immediately after the execution thereof,
 under your seal and the seals of those by whose oath you shall
 make the said extent and appraisalment. And have there then
 this writ.

Witness

*Course of Priority of Payment out of the Estate of the Bank-
 rupt, of the Costs of the Petitioning Creditors, Sect. 114, and
 of payment of Costs out of joint or separate Estates.*

Course of
 priority for
 payment of the
 costs of the
 petitioning
 creditor.
 12 & 13 Vict.
 c. 106, s. 114.

CXIV. That after payment or retainer out of the estate of the
 bankrupt of all monies duly paid by the official assignee, the
 per-centage on the gross produce of the estate, from time to
 time payable to the credit of "the chief registrar's account,"
 and afterwards the per-centage payable to the official assignee in
 respect of realizing the property, the costs of the petitioner
 of filing and prosecuting his petition until the choice of
 assignees by the creditors shall be paid as follows: first, the
 costs and charges of the messenger and broker acting under the
 petition to the time of the choice of assignees, and then the costs
 and charges of the solicitor acting in the matter of the petition
 until the said time.

In case joint
 estate insuffi-
 cient, Court
 may order costs
 to be paid out of
 separate estate,
 and *vice versa*.

CXV. That in case any joint estate of any bankrupts shall
 be insufficient to pay any costs or charges necessarily incurred
 in respect of the same, the Court may order such costs to be paid
 out of the separate estates of such bankrupts, or one or any of
 them; and *vice versa* may order costs necessarily incurred for

any separate estate, if the same were incurred with reasonable probability of benefit to the joint estate, to be paid out of such joint estate.

*Composition after Adjudication of Bankruptcy, under
Sections 230, 231.*

CXVI. That at the first of the meetings of creditors directed by the statute to be held, a minute shall be taken by the solicitor to the assignees, of the names of the several creditors present, and the amount of their several debts standing in proof upon the proceedings, distinguishing such of them as shall assent to such composition.

Minutes of first meeting. 12 & 13 Vict. c. 106, ss. 230, 231.

CXVII. That the second of the said meetings shall be held before the commissioner, and that at such meeting the said commissioner shall, by deposition of witnesses and documentary evidence, as to him shall appear to be proper, inquire and ascertain, whether the several particulars directed by the statute to be performed previous to the holding of such second meeting have been duly performed, and certify the same, together with the proceedings which shall have taken place at such second meeting.

Second meeting to be before commissioner.

CXVIII. That for the better information of all parties interested, the certificate of the commissioner shall state what proportion in number and value the creditors assenting to the composition bear to the creditors who shall have proved debts to the amount of 20*l.* and upwards under the fiat, or petition, and also whether any sale has been made of the bankrupt's estate, in order that provision may, if expedient, be made for confirming the same.

Certificate of commissioner.

With respect to Official Assignees and their Duties.

CXIX. That each commissioner shall appoint his official assignees where more than one is attached to his court, to act in rotation under the several bankruptcies prosecuted before him ;

Appointment by commissioners of official assignees to act.

unless in any case the commissioner shall see cause to the contrary.

Same as to existing commissions and fiats.

CXX. That the same rule for the appointment of official assignees shall be followed as to existing commissions and fiats issued before the 11th October, 1849, under which no official assignee has been appointed.

Appointment of assignees and the certificate thereof.

CXXI. That the appointment of any official assignee to any bankrupt's estate shall be under the hand of the commissioner, and shall remain of record in the said Court of Bankruptcy; and certificates of such appointment, under the seal of the Court, shall be delivered to such assignee by the registrar upon application for the same.

Official assignee not to trade, &c.

CXXII. No official assignee shall either directly or indirectly carry on any trade or business, or hold or be engaged in any office or employment other than his office of official assignee.

Official assignee to find sureties.

CXXIII. Each official assignee shall find sureties to the extent of 6,000*l.*, and shall together with such sureties (except where otherwise especially directed by any three commissioners, of whom the senior commissioner shall be one) execute a joint and several bond to the chief registrar for the time being in the penal sum of 6,000*l.*

Liability of official assignee and sureties.

CXXIV. Each official assignee to be made liable to the whole amount, and the sureties to be liable together to the like amount, in such proportions as shall be approved of by such three commissioners, provided that no one surety shall be liable for more than 3,000*l.* nor less than 1,000*l.*

The official assignee annually to make declaration that his sureties, to the best of his belief, are alive and solvent, and also state any change of residence.

CXXV. That each official assignee shall, on the 1st day of January in every year, or within one week then next following, make a declaration in writing, to be filed with the chief registrar, that to the best of his knowledge and belief his sureties are alive and solvent; and in such declaration state, to the best of his knowledge and belief, any change of residence of any or either of such sureties.

Official assignee to give

CXXVI. Each official assignee shall, on pain of dismissal, give

immediate notice in writing, to the chief registrar, of the death, bankruptcy, or insolvency of any or either of his sureties; and shall, if required, cause a new bond to be executed to the like amount by another surety or sureties, to be approved of as above.

notice of death, bankruptcy or insolvency of his sureties.

CXXVII. Each official assignee shall follow the instructions of the commissioner under whom he acts.

Official assignee to follow the instructions of the commissioner.

CXXVIII. That no official assignee shall keep under his control upon any one estate more than 100*l.*; or, in the aggregate of monies of bankrupts' and petitioning debtors' estates, more than 1,000*l.*; and any excess beyond such sum shall be paid by him forthwith into the Bank of England.

No official assignee to have under his control more than 100*l.* under any one estate, or in the aggregate more than 1,000*l.*

CXXIX. That the official assignees, at the time of paying monies into the Bank of England, shall state in writing, delivered therewith to the cashier of the Bank, in the form specified in the schedule hereunto annexed (No. 4), the date and amount of the payment, the name of the official assignee making it, the name and description of the bankrupt or bankrupts to whose estate the money belongs, and that it is to be placed to the credit of the Accountant in Bankruptcy; and the official assignee shall take a receipt for the same from the cashier of the Bank, and on the same day carry or transmit it to the office of the Accountant in Bankruptcy, who will give a proper voucher for such receipt, and that the money is placed to the credit of the estate of the said bankrupt, or bankrupts, in the books kept in the office of the Accountant in Bankruptcy, such voucher to be produced when called for by the Court.

Form to be adopted on payment of money into the Bank by an official assignee.

CXXX. That the allowance to be made to the official assignee shall be upon the following scale: subject to variation in any particular case, and for special cause to be assigned by the commissioner in writing, and filed with the proceedings.

Allowance of official assignees.

SCALE.

That there be paid to each official assignee for the examination of the bankrupt's accounts, such sum as the commissioner shall think fit, not exceeding 20*l.* for the accounts of one bankrupt, nor exceeding 20*l.* for the joint estate of two or more bankrupts;

and not exceeding 10*l.* for each separate estate, administered under the same adjudication.

For every debt collected 5 per cent. on the first amount of 100*l.* or any less sum; $2\frac{1}{2}$ per cent. on the next amount of 400*l.* or any less sum; 1 per cent. on the next amount of 500*l.* or any less sum; and $\frac{1}{2}$ per cent. on all further sums.

For property realized $2\frac{1}{2}$ per cent. on the first amount of 500*l.* or any less sum; 1 per cent. on the next amount of 500*l.* or any less sum; and $\frac{1}{2}$ per cent. on all further sums.

On dividend 2 per cent. on the first amount of 1,000*l.* or any less sum, actually divided; and 1 per cent. on all further sums.

The per-centage on mortgaged property to be calculated only on the residue payable to the bankrupt's estate.

For drawing every dividend warrant, or renewed dividend warrant, sixpence.

NOTE.—At the expiration of twelve months after these orders come into operation, this scale will be revised by the commissioners (subject to the approval of the Lord Chancellor), regard being had to the amount of remuneration received by the official assignees in the preceding twelve months.

Official assignee to keep a register of the bankruptcies to which he has been appointed.

CXXXI. That the official assignee shall enter in a book, to be called the register estate book, the names of the bankrupts in the commissions, fiats, and petitions to which he shall have been or shall be appointed.

Particular sets of books to be kept by the official assignee.

CXXXII. That the official assignee shall keep the following set of books, in size and form heretofore used; that is to say, register estate book (No. 1); register book of bankrupt's books delivered to official assignee under each estate (No. 2); debtor and property book; rough cash book; fair cash book; rough journal; fair journal (for bills of exchange, securities, &c.); ledger; letter book; petty cash and postage book; audit book.

Official assignee to sort and number books, &c. of bankrupt.

CXXXIII. That the official assignee, forthwith after his appointment under any bankrupt's estate, shall sort and number the books, papers, and writings of the bankrupt, with the number of

the estate, in the register estate book, and the number of each book, thus :—

[54. (The number of the estate in the register estate book).

75. (The number of the book, paper, or writing received by the official assignee)].

and the official assignee shall file a list thereof, with the proceedings, and shall also forthwith after his appointment deliver to the bankrupt a written notice or letter in the form specified in the schedule hereunto annexed (No. 1).

CXXXIV. That the official assignee shall direct, in the form specified in the schedule hereunto annexed (No. 2), the payment of all monies due to any bankrupt's estate from any one person, or from two or more persons being partners, and carrying on business or residing in England, and exceeding in amount the sum of 500*l.*, and of all monies being in the hands or under the control of any assignee or assignees chosen by the creditors of any bankrupt's estate to which such official assignee shall have been appointed, into the Bank of England, to the credit of the accountant in bankruptcy, and for the particular estate to which such money shall belong.

Official assignee to direct the payment of monies due to a bankrupt's estate from persons in England, and exceeding a certain sum in amount to be made direct into the Bank of England.

CXXXV. That when any money shall be paid into the Bank of England, pursuant to the directions aforesaid, the person so paying such money shall receive a certificate in the form specified in the schedule hereunto annexed (No. 3), from one of the cashiers of such Bank, of his paying the same, and of its being placed to the account of the Accountant in Bankruptcy for the proper estate, and a voucher for such payment shall be sent by the Bank on the same day to the said accountant.

Party making such payment to take a receipt for the same.

CXXXVI. That as soon as conveniently may be after every such payment, the Accountant in Bankruptcy shall certify in writing to the proper official assignee that such payment has been made, and the name of the bankrupt or bankrupts to the credit of whose estate the money has been placed in the books kept in the office of the Accountant in Bankruptcy.

Accountant in Bankruptcy to notify such payment to the proper official assignee.

All monies under the control of the official assignee to be kept at a banker's, to his account as official assignee, and not mixed with his own monies.

CXXXVII. That all monies, without exception, received by the official assignee, and not paid by him forthwith into the Bank of England to the credit of the Accountant in Bankruptcy, shall be paid by the official assignee, as soon as they shall amount to 100*l*. into the hands of a banker, with whom such official assignee shall keep an account as such official assignee, such account to be entitled as official assignee, and in which account no monies shall be entered, except such as are received by the official assignee in his official capacity.

Order for payment of money out of the Bank of England under any bankrupt's estate to be made by a commissioner in writing under his hand, and testified by a registrar; the application of the money to be specified in the order.

CXXXVIII. That all monies paid into the Bank of England to the credit of the Accountant in Bankruptcy, for the estate of any person adjudged bankrupt, or in matters of bankruptcy, shall be subject to the order of a commissioner of the Court of Bankruptcy, in writing under his hand, and testified by a registrar, as to the application thereof; provided that every such order shall specify the amount of any payment to be made by such order, the purpose to which it is to be applied, and the name of the official assignee or other person to whom the same is to be made for such purpose; and in cases where the sum to be paid exceeds 500*l*. the name of the person beneficially entitled (to whom only in such case the payment shall be made), and the Accountant in Bankruptcy shall and may, pursuant to such order, pay the sum of money specified therein, out of such bankrupt's estate, by a draught, subscribed to, and on the same paper with the said order; such order and draught to be in the form specified in the schedule hereunto annexed (No. 5).

Orders for payment of money, &c. to be signed in triplicate.

CXXXIX. That all orders by the commissioner for payment of money, or for the transfer and sale (as hereinafter provided) of any stock or securities, being part of a bankrupt's estate, be signed in triplicate, and that one copy of any such order be filed with the proceedings in bankruptcy, and that one copy be left with the Bank of England, and that one copy be left with the Accountant in Bankruptcy.

Official assignee to enter in a book the names of all debtors to the bankrupt's estate, and state therein the reasons why debts are not paid, and to produce the book at the audit.

CXL. That the official assignee shall, before any audit, enter in a book the names of all the debtors to the bankrupt's estate, as returned in his balance-sheet, and shall state the reasons why debts are not paid on the opposite page; such book shall be produced to the Court at every audit.

CXLI. That each official assignee shall deposit in the Bank of England, to the credit of the Accountant in Bankruptcy, all bills, notes, and other negotiable instruments, except unaccepted bills of exchange, as soon as he shall receive the same; and shall deposit in like manner all unaccepted bills of exchange as soon as the same shall have been accepted or refused acceptance; and shall at the time of such deposit leave a statement in writing, with the cashier of the Bank of England, specifying the date and contents of the instruments so deposited, the name of the official assignee making such deposit; the name and description of the bankrupt or bankrupts, and the particular estate to which the same respectively belong, and that such instruments respectively are to be deposited to the credit of the said Accountant in Bankruptcy; and shall also take a receipt for the same from the cashier of the Bank, and carry or transmit it to the office of the said Accountant in Bankruptcy, who will give a proper voucher, to be produced when called for by the Court.

Bills of exchange, notes, &c. to be deposited in the Bank by official assignees, &c.

CXLII. That when, and as soon as any bill, note, or other negotiable instrument, deposited as aforesaid in the Bank of England in the name of the said accountant, shall become due, the Governor and Company of the Bank of England shall, without any direction from the said accountant, deliver such bill, note, or other negotiable instrument, to one of the cashiers of the Bank, who is to present the same for payment, and receive the sum of money due thereon, and forthwith to pay the sum so received, if any, into the Bank of England, to be there placed to the credit of the said accountant.

Bill, &c., when due, how to be dealt with.

CXLIII. That in case any such bill, note, or other negotiable instrument, shall not be paid, the said Governor and Company of the Bank of England shall cause such bill, note, or other negotiable instrument as is by law required to be noted and protested, to be delivered to a notary for that purpose, and to be noted and protested accordingly, and shall, after the same shall have been so noted and protested, as the case may be, again deposit the same in the Bank of England, to the credit of the said accountant.

In case of non-payment, &c.

CXLIV. And that the said Governor and Company of the Bank of England forthwith, after every such receipt of money

Bank of England to certify to

accountant the receipt of money on bill, or dishonour, &c.

or deposit of any note, bill, or other negotiable instrument, shall certify to the said accountant the sum of money received, if any, on each such bill, note, or negotiable instrument, and placed to the credit of the said accountant, or that such bill, note, or negotiable instrument, has been dishonoured; and such dishonoured bill, note, or other negotiable instrument, shall be forthwith delivered by the Bank to the proper official assignee.

Official assignee to give notice of dishonour, &c.

CXLV. And that as often as any bill, note, or other negotiable instrument, that shall have come to the hands of any official assignee, shall have been or shall be dishonoured, such official assignee shall forthwith give such notice thereof as is by law required from the holder of such bill, note, or other negotiable instrument respectively.

Commissioner to order delivery out of bills, notes, &c. to official assignee.

CXLVI. That any one of the commissioners of the Court of Bankruptcy acting in the prosecution of any bankruptcy may, from time to time, make order relative to the delivery out to an official assignee of any bill of exchange or promissory note, which may stand in the Bank of England to the credit of the Accountant in Bankruptcy for the estate under such bankruptcy; provided that the purpose of such delivery be stated in the order, and such order be attested by a registrar.

Commissioner may order money to be invested in Exchequer-bills or sale of Exchequer-bills, &c.

CXLVII. That any one of the commissioners of the Court of Bankruptcy acting in the prosecution of any commission, fiat, or petition for adjudication of bankruptcy, may, as often as it shall appear to him expedient, by order under his hand in the forms specified in the schedule hereunto annexed (Nos. 6, 7, and 8), direct any money, which may have been paid into the Bank of England on account of the estate of the bankrupt named in such commission, fiat, or petition, to be invested in the purchase of Exchequer-bills, to be lodged in the Bank of England, and may in like manner direct the sale or exchange of such Exchequer-bills, and also the exchange, sale, or transfer of any stock in the public funds, or in any public company, or of any Exchequer-bills, India bonds, or other public securities which shall have been transferred, delivered, or paid into the Bank of England on account of such bankrupt's estate, and may direct the proceeds thereof to be laid out in the purchase of Exchequer-bills, and that such Exchequer-bills, when so purchased, be

deposited in the Bank of England, to the credit of the said accountant for such particular estate; and the said accountant shall and may, pursuant to such order, make such sale, purchase, or transfer, without any further order or direction; and the expenses thereof may be charged to the account of the estate for the benefit of which the same shall have been respectively made.

Provided always, that the signature of the commissioner be attested by a registrar, and that the order of the Accountant in Bankruptcy be subscribed to the order of the commissioner, and on the same paper with the said order.

Provided further, that no stock or public fund be transferred upon any sale, and that no Exchequer-bill, India bond, or public security, be delivered for the purpose of sale, except to a cashier of the Bank of England, until the price or value thereof be paid into the Bank of England to the credit of the Accountant in Bankruptcy for the particular estate to which it belongs, and that no sum be paid for the purchase of any Exchequer-bill, India bond, or other public security, until such Exchequer-bill, India bond, or public security be deposited in the Bank of England to the credit of the said Accountant in Bankruptcy, and for such particular estate.

CXLVIII. That the official assignee shall forthwith after the declaration of a dividend, give notice by advertisement in the *London Gazette*, and to each creditor, by a printed circular letter in the form specified in the schedule hereunto annexed (No. 9), to be sent through the Post-office at the the cost of the bankrupt's estate, to be settled by the commissioner, of the time and place of the delivery of the dividend warrants as hereinafter provided; and that at such time the official assignee will require the production of such securities, if any, as the creditor exhibited at the time of his proof; and that no dividend warrant will be delivered to the creditor holding any security for his debt until such security shall be produced, without the special directions of a commissioner in that behalf.

The official assignee to give notice in *Gazette* and to send through the Post-office a printed circular letter to each creditor, giving him notice of the time and place of the delivery of the dividend warrant.

CXLIX. That when a dividend has been or may be declared, the solicitor to the estate shall forthwith make out three lists

Payment of dividend. The duty of solicitors.

of the creditors in alphabetical order, and shall state, in separate columns, after the name of each creditor, the amount of his debt and the dividend to which he is entitled, and in two of such lists the securities exhibited at the time of proof, and shall to each name prefix a number in regular series, together with the date of the order of dividend, according to the form in the schedule hereunto annexed (Nos. 10 and 11), and shall sign such several lists, and deliver the same within four days after the declaration of such dividend to the official assignee, who shall cause one of the lists which specifies such securities to be filed with the proceedings, and shall examine and sign the several lists, if correct, and shall prepare books at the expense of the estate, containing as many blank warrants as may be necessary, according to the form in the schedule hereunto annexed (No. 12) for London, and (No. 13) for the country, and shall number and fill up a warrant for each dividend, and insert in each warrant the name of the creditor to which the number of such warrant is prefixed in the list, and the dividend payable to him, and shall keep one of the lists specifying the securities in his custody, and shall take or send the books containing such warrants, together with the list not specifying the securities, to the Accountant in Bankruptcy, who shall ascertain that the amount of such warrants does not exceed the sum standing in his name to the credit of the bankrupt's estate, and shall compare the warrants with the lists, and if correct shall certify the same, by affixing the seal of his office, to be provided for that purpose, in the margin of the warrants; and he shall keep in his custody the list of creditors, and return the warrants to the official assignee, for delivery to the creditors as hereinafter mentioned.

Duty of official assignee.

Accountant's duty.

Official assignee's duty.

CL. That when a creditor, or any person duly authorized under his hand to receive his dividend warrant, shall apply for the same, the official assignee shall require the production of such securities (if any) as the creditor exhibited at the time of his proof, and if satisfied that the amount of the said dividend still remains due, shall fill up the date in the warrant and receipt, and upon the creditor or such other person authorized as aforesaid signing the receipt, the official assignee shall mark the securities (if any) with the amount of that dividend, and shall sign and deliver the warrant for the same; provided that no dividend warrant shall be delivered to any creditor holding any security for his debt

until such security shall be produced ; provided that upon the statement of a creditor that he is unable to produce his security, and that the same has not been parted with for any valuable consideration, nor assigned to any person, he shall be examined on oath before a commissioner as to the cause of such inability, and his examination shall be filed with the proceedings, and the commissioner shall adjudge whether in his opinion the creditor is or is not able to produce the security ; and if the commissioner is of opinion that the security cannot for a sufficient cause be produced, the creditor shall give a sufficient indemnity to the official assignee, to be approved by the commissioner, and upon such indemnity being given the official assignee shall deliver the dividend warrant to the creditor.

Commissioner to order payment of dividend in cases where securities cannot be produced.

CLI. That the payment of the dividend warrant may be obtained by the creditor, or any person duly authorized by him under his hand to receive his dividend, or by the executor or administrator of any such creditor, upon production of the dividend warrant at the office of the Accountant in Bankruptcy, or in a country bankruptcy, at any branch of the Bank of England, or such other bank as shall be named by the Bank of England in that behalf.

Dividend warrant, how paid.

CLII. That if any other person than the creditor or person duly authorized by him, or the executor or administrator of any such creditor, claim to receive the dividend, the person so claiming the same must obtain an order for payment thereof endorsed upon the warrant by a commissioner under his hand ; and if any dividend warrant be above twelve months' date, a like order for payment thereof by a commissioner shall be required : provided always, that in no case shall any dividend warrant be paid to an official assignee unless such official assignee be the payee, or the executor or administrator of the payee, or the assignee of any bankrupt payee.

When order of commissioner for payment of dividend warrant.

CLIII. That when a dividend has been or may be declared under any commission, fiat, or petition for adjudication, the commissioner acting in the prosecution of such bankruptcy may, by order under his hand, attested by a registrar, in the form specified in the schedule hereunto annexed (No. 14), direct the sum ordered to be divided, or such part thereof as may be re-

Transfer of money from general account to dividend account.

Commissioners authorized to carry back dividend not called for to the original account of estate.

quired, to be carried from the general account of such estate to an account to be kept in the books of the Accountant in Bankruptcy, entitled "The Dividend Account," and to the particular estate; provided that when it shall appear that any part of the money directed to be applied in payment of any dividend is not called for to make such payment, the commissioner may, by order under his hand, testified as aforesaid, and in the forms specified in the schedule hereunto annexed (Nos. 15, 16, 17, 18, and 19, as the case may be), direct such sum to be carried back to the original account of the estate to which it belonged.

Unpaid dividend warrants of above twelve months' date to be returned to the Accountant in Bankruptcy by the official assignee, and cancelled.

CLIV. That all dividend warrants under any bankrupt's estate, which shall have been delivered to any official assignee by the Accountant in Bankruptcy for more than twelve calendar months, the same having been previously stamped by such accountant, but which shall not have been delivered to any creditor of such estate, shall forthwith, after the expiration of such twelve months, be brought or sent by such official assignee, together with two lists thereof, under each bankrupt's estate, to the said accountant, who shall thereupon compare the warrants with such lists, and cancel such warrants; and one of such lists shall be certified by the said accountant, and returned to the official assignee, who shall file such list with the proceedings of the respective bankruptcies; and the other of such lists to be retained by the said accountant.

Official assignee to deliver quarterly accounts of balances, together with his cash-book and pass-book.

CLV. That the official assignee shall once in every quarter of a year deliver to the Court to which he shall be attached, an account made up to the last day of the preceding month, together with his cash-book and banker's pass-book duly balanced, and any other books that the commissioner may require; and such account shall show the balances placed to the credit of the Accountant in Bankruptcy, and of every estate under the charge of such official assignee in the books kept in the office of the Accountant in Bankruptcy, such balances to be certified by the said accountant; and such account shall also show the balances of every bankrupt's estate then in the hands or under the power or control of the official assignee.

The quarterly accounts to be kept by regis-

CLVI. That such quarterly account shall be kept by the registrar of the court to which such official assignee shall be

attached, and shall be open to the inspection of creditors; and that notice shall be given in each court of such account having been delivered, and that any creditor applying to the Court may inspect the same without fee at such convenient time as may be appointed by the Court.

registrar of the court, and open to the inspection of creditors at convenient times.

CLVII. That all monies, bills of exchange, notes, and other negotiable instruments hereinbefore directed to be paid or delivered to or by the Bank of England, may be paid or delivered to or by the Bank of England by or through any of the branch banks thereof, or any other bank that may be named by the Governor and Company of the Bank of England for that purpose; and all business arising in the country with the Bank of England may, where necessary or convenient, be transacted with the Bank of England by or through any of such branch banks, or other bank so named.

Monies or bills, &c., may be paid or delivered to the Bank of England through any of the branch banks thereof.

CLVIII. That the several forms specified in the schedule hereunto annexed for the several purposes therein stated, and not hereinbefore referred to, be followed in all cases where the same may be applicable.

Other forms in the schedule to be followed where applicable.

CLIX. That if the official assignee shall without good and sufficient cause, to be allowed by the Court, keep under his control more than 100*l.* of money belonging to any one estate, or more than 1,000*l.* in the aggregate of monies belonging to bankrupts' estates, for more than one week, he shall be charged in his accounts by the commissioner with such sum as shall be equal to interest at the rate of 20*l.* per cent. per annum, on the excess of the said sum of 100*l.* or 1,000*l.* as the case may be, for such time as such money shall be under his control beyond the said week; and, unless the money has been kept for good and sufficient cause, allowed by the Court, the official assignee shall be dismissed from his office, upon the report of the commissioner, or upon petition to the Lord Chancellor by the creditors' assignee or assignees, or by any creditor, and be liable to the costs and expenses, and have no claim to remuneration.

Official assignee keeping under his control more than 100*l.*, under any one estate, or more than 1,000*l.* in the aggregate, to be charged with 20*l.* per cent. on the excess, and unless the money has been kept from proper causes, to be dismissed from his office, on the report of the commissioner, or upon petition to the Lord Chancellor.

lor by a creditor, and be liable to costs and expenses, and have no claim to remuneration.

CLX. That all forms relating to the payment or delivery into or out of the Bank of England of any money, bills,

Forms relating to payment, &c. of money

under bank-ruptcies in the country to be printed in red ink. notes, or other securities under bankruptcies, prosecuted in the country, be printed in red ink.

Orders as to official assignees under bankruptcies to be applicable to official assignees under petitions for arrangements, &c. CLXI. That the orders hereby made as to official assignees of the estate of bankrupts, and their duties and conduct, shall, so far as the same are applicable, apply to and be observed by official assignees, appointed under petitions presented by debtors desirous of effecting arrangements with their creditors, under the superintendence and control of the Court.

Printed copies of rules to be supplied by chief registrar, &c. CLXII. That printed copies of these rules and orders shall be supplied by the chief registrar, to the several Courts of Bankruptcy in London, and in the country districts; and also to the Accountant in Bankruptcy, the Governor and Company of the Bank of England, the Master in Bankruptcy, and each official assignee; and that one such copy be posted up in some conspicuous place in every such court; and in the respective offices of the chief registrar, the Accountant in Bankruptcy, the Master in Bankruptcy, and official assignees.

Rules and orders, when to take effect. CLXIII. That these rules and orders shall take effect from and after the 11th day of January, 1853, from which time all rules and orders made previous to the passing of the Bankrupt Law Consolidation Act, 1849, and the order made on the 12th of October, 1849, shall be and are hereby rescinded.

JOSHUA EVANS, *Senior Commissioner.*

JOHN S. M. FONBLANQUE,

EDWARD HOLROYD,

EDWARD GOULBURN,

WM. THOS. JEMMETT,

M. B. BERE,

RICHARD STEVENSON,

WILLIAM SCROPE AYRTON,

H. J. PERRY,

} *Commissioners.*

Approved,

St. Leonards, C.

19th Oct. 1852.

SCHEDULE OF FORMS.

No. 1.

Form of Letter to Bankrupt forthwith after Appointment of Official Assignee.

SIR,

(Residence and Date.)

HAVING been appointed official assignee to your estate, I have to inform you that the Court requires you to make out and deliver to me immediately :—

- 1st.—A list of all your creditors, alphabetically arranged, and of liabilities on bills of exchange, as acceptor, drawer, or indorser, and any other engagement provable under your estate.

If any creditor has received your acceptance or note of hand, or any other bill, with your name as drawer or indorser, or any other security, goods, or property, on account of his debt, state the particulars against his name.

This list is required within a week from this day.

- 2ndly.—A list of all the debtors to your estate.

State the name and present residence of the debtor, and the sum due, distinguishing those you consider to be bad or doubtful, or that are disputed.

If the debtor has been bankrupt, state if the debt has been proved, and if any and what dividends have been received by you.

If you hold or have received any security from the debtor, state its nature.

- 3rdly.—A statement of rent, taxes, and rates due by you up to the quarter-day preceding your bankruptcy, with an account of all sums due for salaries and wages, and the rate per year, month, or week.

- 4thly.—A statement of the probable value of your stock in trade, leasehold property in houses, lands, or buildings, or any other property in your possession or control, or in the possession of others, on which you have received any advances, or have an interest.

State if the stock and premises are insured from fire, in what office, and to what extent, and when the insurance expires, and who holds the policy.

- 5thly.—A list of all books, papers, or documents belonging to your estate, such list to be verified on oath, specifying whether the same are already taken by the messenger, or are in your custody (in which case you are hereby required to deliver the same to me), or are in the custody of any other and what person, and under what right or circumstance. And the Court requires that you attend from day to day at my office, to make up and balance your books, and prepare a balance-sheet for the purpose of passing your last examination, and which must be filed at least ten days before the day appointed for the last examination, being the day of

I remain, Sir,

Your obedient Servant,

To Mr.

Official Assignee.

No. 2.

Direction from Official Assignee for Payment of Sums exceeding £500 in amount due to a Bankrupt's Estate into the Bank.

Bankrupt Law Consolidation Act, 1849.

By virtue of the general orders made under this Act, and bearing date the _____ day of _____, I hereby direct you to pay the sum of £_____ due [or by the books and statements of the bankrupt hereinafter named, appearing to be due] from you to the estate of C. D., of _____ a bankrupt, into the Bank of England, to the credit of the Accountant in Bankruptcy for the said estate.

At the time of payment you will have a receipt from the Bank, which will be a sufficient discharge to you for the same.

I am, &c.

Official Assignee.

To

N.B.—*It is of great importance that you should produce this letter to the Bank, or fill up the annexed form, when you make the payment.*

No. 2 *a.*

BANKRUPT'S ESTATES.

London, or day of 18

Estate of

of

Official Assignee.

A. B.

of

is desirous to pay into the Bank of England the sum of £

to the credit of

Esq., Accountant in

Bankruptcy for the above estate.

£ **Ent^d**

Bank Clerk.

*To be sent or transmitted by the Bank forthwith to the Accountant in
Bankruptcy, upon payment being made into bank.*

Nos. 3 and 3 a.

Certificate of Payment into Bank by other than Official Assignees.

 BANKRUPT'S ESTATES.

day of 18

Estate of

I HEREBY CERTIFY, that A. B.

of

has this day paid into the Bank of England the sum of £
 to be placed to the credit of Esq., as the
 Accountant in Bankruptcy for the above estate.

For the GOVERNOR and COMPANY
 of the BANK of ENGLAND.

 £

Cashier.

Ent^d

N.B.—*This certificate to be retained by party making payment in.*

Nos. 4 and 4 a.

Certificate of Payment into Bank by Official Assignee.

C

BANKRUPT'S ESTATES.

day of

18

I HEREBY CERTIFY, that Mr. E. F., official assignee of the estate
of
bankrupt has this day paid into the Bank of England
the sum of £
to be placed to the credit of Esq., as the
Accountant in Bankruptcy.

For the GOVERNOR and COMPANY
of the BANK of ENGLAND.

£

Cashier.

Ent^d

N.B.—*This certificate to be sent forthwith to the Accountant in Bankruptcy
by the official assignee, upon payment being made into bank.*

Nos. 5 and 5 a.

Order for Payment of Money.

 BANK.

IN THE COURT OF BANKRUPTCY.

 Basinghall-street, London,
 day of 18

Before Mr. Commissioner

In the matter of

I certify that by my books the sum of £ stands to the credit of the above estate in the books of the Accountant in Bankruptcy. It appearing to me, by the annexed certificate, that the sum of £ stands to the credit of the above estate, and that the sum of £ is required for the

Official Assignee. I therefore order the said sum to be paid to out of the monies standing to the credit of the Accountant in Bankruptcy, in the books of the Bank of England.

Commissioner.

Reg.

Estate of

Pursuant to the above order, paid to the said the said sum of £ to be charged to the debit of my account as Accountant in Bankruptcy.

Accountant.

 £

To the Cashiers of the
 Bank of England.

Nos. 6 and 6 a.

Order for Purchase of Exchequer Bills.

IN THE COURT OF BANKRUPTCY.

Basinghall-street, London,
day of 18

Before Mr. Commissioner

In the matter of

I certify that
by my books the sum
of £ stands to the credit of
the estate in the books
of the Accountant in
Bankruptcy.

Official Assignee.

IT appearing to me, by the annexed certificate,
that the sum of £ stands
to the credit of the above estate, I order the sum of
£ to be laid out in the
purchase of Exchequer-bills, and that the Exchequer-
bills when purchased be deposited in the Bank of
England to the credit of the accountant in bank-
ruptcy: provided that no sum be paid for such
purchase until the Exchequer-bills be deposited in
the Bank of England.

Commissioner.

Reg.

Estate of

Pursuant to the above order pay to
the sum of £ on his
causing £ Exchequer-bills so
purchased to be deposited in the bank to the credit of my account
as Accountant in Bankruptcy.

Accountant.

£

To the Cashiers of the
Bank of England.

Nos. 7 and 7 a.

Order for Sale of Exchequer Bills.

IN THE COURT OF BANKRUPTCY.

Basinghall-street, London,
day of 18

Before Mr. Commissioner

In the matter of

I certify that by my books the within-mentioned Exchequer-bills stand to the credit of the above estate, in the books of the Accountant in Bankruptcy.

It appearing to me, by the annexed certificate, that the following Exchequer-bills stand to the credit of the above estate, viz.

Official Assignee.

I order that of such Exchequer-bills be forthwith sold, and for that purpose that such Exchequer-bills be delivered out to one of the cashiers of the bank, who is to receive the money arising by such sale, and pay the same into the Bank of England to the credit of the Accountant in Bankruptcy; provided that such Exchequer-bills be not delivered by the cashier of the bank until the proceeds of the sale be paid into the bank as aforesaid.

Commissioner.

Reg.

Estate of

Pursuant to the above order, deliver out of the Bank of England to one of the cashiers of the bank, the following Exchequer-bills, viz.

for the purpose of being sold: provided that such Exchequer-bills be not delivered by the cashier of the bank until the proceeds of the sale be paid into the bank as aforesaid.

Accountant.

£

To the Cashiers of the
Bank of England.

Nos. 8 and 8 a.

Order for Sale of Stock.

IN THE COURT OF BANKRUPTCY.

Basinghall-street, London,

day of 18

Before Mr. Commissioner

In the matter of

I certify that
by my books the sum
of £
stock stands to the
credit of the above
estate in the books
of the Accountant in
Bankruptcy.

Official Assignee.

It appearing to me, by the annexed certificate,
that the sum of £

stands to the credit of the above estate, I therefore
order the said sum of £

to be forthwith sold ; provided that such stock be not
transferred by the Accountant in Bankruptcy until the
proceeds of the sale be paid into the Bank of England
to the credit of the said accountant.

Commissioner.

Reg.

To the Cashiers of the
Bank of England.

No. 9.

Notice by Official Assignee to Creditor when Dividend is payable.

District day of 18

Estate of

SIR,

I HAVE to inform you that you may, upon application at my office on any or after the day of between the hours of receive a warrant for the dividend due to you in the above estate.

If you cannot personally attend, the warrant will be delivered to your order upon your filling up and signing the subjoined letter.

The bills and securities (if any) exhibited at the time of the proof of your debt, must be produced to me before the warrant for the dividend can be received.

I am,

Sir,

Your obedient Servant,

Official Assignee.

Residence.

To

day of 18

Estate of

SIR,

Please deliver to the dividend warrant payable to me under the above estate.

Creditor.

To

Official Assignee.

Nos. 10 and 10 a.

List of Proofs of Debt and Claims for Dividend.—No. 2.

FORMS OF LIST.

IN THE COURT OF BANKRUPTCY.

Basinghall-street, London,

18

In the matter of

Bankrupt.

A LIST OF DEBTS proved and claimed under the

with

the dividend at the rate of

in the pound, this day declared thereon by Mr. Commissioner

No.	Creditors. To be placed alphabetically, and the Names of all the Parties to the Proof to be carefully set forth.	Sum proved. The Claims to be set forth in the same Manner at the End of the whole of the Proofs.	Dividend.	

List of Proofs of Debt and Claims for Dividend.—No. 1.

IN THE COURT OF BANKRUPTCY AT BASINGHALL-STREET.

In the matter of

Bankrupt.

18

A LIST OF DEBTS proved and claimed under this bankruptcy, with the
in the pound, this day declared thereon by Mr. Commissioner
dividend at the rate of

NOTE.—The dividends will be paid from this list; it is therefore required to be carefully extracted from the proceedings; signed by the solicitor to the fiat, and delivered to the official assignee the same day, or, at the furthest, the following day.

No.	Creditors. To be placed alphabetically, and the Names of all the Parties to the Proof to be carefully set forth.	Residence and Description.	Sums proved or claimed. Claims to be set forth in the same Manner after the whole of the Proofs.	Dividend.	Bills and Securities exhibited.			
					Date of Bill or Note.	Drawer. Acceptor.	Indorser.	Sum.

Margin of Book.

Number of Warrant.

Estate

dividend of in the £
Creditor *A.B.*Rec^d Warrant day of
Creditor.

£

No. 12.

London Dividend Warrant.—No.

London day of 18

Estate of

Bankrupt.

(Under fiat or commission, or petition for adjudication of bankruptcy, dated).

dividend of in the £
declared day of 18*A. B.*

is entitled

to be paid the sum of £

Official Assignee.

To the Accountant in Bankruptcy.

Order for Payment. { Let this be paid to *A.B.* or
bearer from my account as
Accountant in Bankruptcy.

Accountant.

£

To the Cashiers of the
Bank of England.

N.B.—*This, upon being endorsed by the payee, will be paid any day between the hours of eleven and three, at the office of the Accountant in Bankruptcy, at the Court of Bankruptcy, Basinghall-street.*

*Observe rules at the back as to endorsement.*

No. 12—*continued.**Rules as to Endorsement of Warrant.*

THAT the endorsement by an executor or administrator of any creditor be sufficient.

That if any other person than the creditor, or person duly authorized by the creditor, claim to receive the dividend, the person so claiming the same must obtain an order for payment thereof upon the warrant by a commissioner under his hand; and if any dividend warrant be above twelve months' date, a like order for payment thereof by a commissioner shall be required: Provided always, that in no case shall any such dividend be paid to an official assignee, unless such official assignee be the payee, or the executor or administrator of the payee, or the assignee of any bankrupt payee.

Margin of Book.

Number of Warrant.

Estate of

dividend of in the £
CreditorRec^d Warrant day of Creditor.

day of

£

No. 13.

*Country Dividend Warrant.—No.*_____
district day of 18Estate of bankrupt.
(Under fiat or commission, or petition for adjudica-
tion of bankruptcy, dated).dividend of in the £
declared day of 18
A.B. is entitled
to be paid the sum of £

Official Assignee.

To the Accountant in Bankruptcy.

Order for Payment. { Let this be paid to *A.B.* or
bearer from my account as
Accountant in Bankruptcy.
Accountant.

£

To the Cashiers of the Bank of England.

N.B.—*If the sum to be paid on the above warrant be under the sum of ten pounds, the same may be received at any branch of the Bank of England without the signature of the accountant, if presented within one calendar month of the date of the warrant.*

This, upon being endorsed by the payee, will be paid any day between the hours of eleven and three, at the office of the Accountant in Bankruptcy, at the Court of Bankruptcy, Basinghall-street, London, or at any branch of the Bank of England.

*Observe rules at the back as to endorsement.*

No. 13—*continued.**Rules as to Endorsement of Warrant.*

THAT the endorsement by an executor or administrator of any creditor be sufficient.

That if any other person than the creditor, or person duly authorized by the creditor, claim to receive the dividend, the person so claiming the same must obtain an order for payment thereof, upon the warrant by a commissioner under his hand; and if any dividend warrant be above twelve months' date, a like order for payment thereof by a commissioner shall be required: Provided always, that in no case shall any such dividend be paid to an official assignee unless such official assignee be the payee, or the administrator or executor of the payee, or the assignee of any bankrupt payee.

Nos. 14 and 14 a.

Order of Transfer to Dividend.

IN THE COURT OF BANKRUPTCY.

Basinghall-street, London,
day 18

Before Mr. Commissioner

In the matter of

By the annexed certificate, it appears that the sum
of £
stands to the credit of the above estate; and by an
order made in this bankruptcy on the day

I certify that by of a dividend amounting to £
my books the sum of £
stands to the credit of was ordered to be paid to the creditors: I therefore
the above estate in the order the sum of £
books of the Account-
ant in Bankruptcy. to be carried to the "Dividend Account" of the above
Official Assignee. estate.

Commissioner.

Reg.

£

Carried over

day of

Ent^d

Nos. 15 and 15 a.

Proof reduced.

IN THE COURT OF BANKRUPTCY.

day of 18

Before Mr. Commissioner

In the matter of

I HAVE altered the proof of
 from £ to £
 and hereby direct a warrant to be drawn for the dividend of
 in the pound, corresponding with such alteration, and amounting to the
 sum of £ and I further direct a new
 warrant to be made out for the balance £
 to be carried back to the original account of the above estate, in the books
 of the Accountant in Bankruptcy.

£ To be signed.

£ To be carried to the "Original Account."

£ Dividend on original proof.

Commissioner.

£ Carried back day of

Ent^d

N.B.—*Old warrant to be produced to Accountant in Bankruptcy, and cancelled by him, before new warrant be stamped and signed by him.*

Nos. 16 and 16 a.

Proof expunged.

IN THE COURT OF BANKRUPTCY.

day of 18

Before Mr. Commissioner

In the matter of

I HAVE expunged the proof of
and I order that a new warrant be made out for the dividend thereon,
amounting to £ to be carried back to
the original account of the above estate, in the books of the Accountant in
Bankruptcy.

Commissioner.

£	Carried back	day of
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Ent^d

N.B.—*Old warrant to be produced to Accountant in Bankruptcy to be
cancelled by him.*

Nos. 17 and 17 a.

Claim established.

IN THE COURT OF BANKRUPTCY.

day of

18

Before Mr. Commissioner

In the matter of

having established his claim of

£

I hereby direct a warrant to be drawn

for the dividend of

in the pound thereon

amounting to the sum of £

Commissioner.

£

Signed

day of

Ent^d

Nos. 18 and 18 a.

Claim in part established.

IN THE COURT OF BANKRUPTCY.

day of 18

Before Mr. Commissioner

having in part established his
claim of £ to the extent of £

I hereby direct a warrant to be drawn for £
being the dividend on the sum of £

And I further direct a warrant for the residue of the dividend
reserved on the said claim of £ amounting
to £ to be drawn, and the sum carried to
the original account of the above estate in the books of the Accountant in
Bankruptcy.

£ To be signed.

£ To be carried to "Original Account."

£ Originally reserved, being the dividend at the rate
of in the pound on £

Commissioner.

£ Carried back day of

Ent^d

Nos. 19 and 19 *a*.

Claim expunged.

IN THE COURT OF BANKRUPTCY.

day of

18

Before Mr. Commissioner

In the matter of

I HAVE expunged the claim of
 for £ and hereby direct a
 warrant to be drawn for the dividend of
 in the pound thereon, amounting to the sum of £
 to be carried back to the original account of the above estate in the books
 of the Accountant in Bankruptcy.

Commissioner.

£

Carried back

day of

Ent^d

No. 20.

Form of Payment into Bank by Official Assignee to the Chief Registrar's Account.

Per-centage Fee under Bankrupts' Estates,
12th & 13th Victoria, cap. 106.

day of 18

I DO HEREBY CERTIFY, that Mr. official
assignee of the estate of
bankrupt, has this day paid into the Bank of England the sum of
£ to be placed
to the credit of Esq., as the Accountant
in Bankruptcy, and to the credit of "The Chief Registrar's Account."

For the GOVERNOR and COMPANY
of the BANK of ENGLAND.

£

Cashier.

Ent^d

N.B.—*This certificate to be sent or transmitted forthwith to the Accountant in Bankruptcy upon payment being made into bank.*

No.

(Residence
and Date.)

By the books and statements of the above bankrupt you appear
to be indebted to this estate in the sum of £ which, if
admitted, I request may be paid *at my office* on or before the

I remain, Sir,

Your obedient Servant,

Official Assignee.

OFFICE HOURS—Nine till Four.

*Bring or send this letter on calling, and in any written communications
please name the estate and the number.*

No. 22.

Another Form for Debtors, for Sums under £500, intended for those residing out of London.

No.

Estate of

(Residence
and Date.)

SIR,

By the books and statements of the above bankrupt, you appear to be indebted to this estate in the sum of £
which I request may be paid to me *at my office*, on or before the

If the claim is incorrect, or any objection intended to the payment, I request the favour of being immediately informed of the grounds thereof.

I remain, Sir,

Your obedient Servant,

Official Assignee.

NOTE.—*If this debt be not paid by the above day, interest thereon at the rate of five per cent. per annum, will be demanded, pursuant to the 3rd and 4th William IV. cap. 42.*

It may be desirable for parties in the country to be informed that the postmaster in post-towns will receive sums not exceeding £5, and give orders for them on the Post Office in London, which orders can be remitted to me in payment of debts.

OFFICE HOURS from Nine to Four.

Bring or send this letter if you call or send.

No. 23.

Second Form of Letter to Debtors, where first Application has not been effectual.

BANKRUPT LAW CONSOLIDATION ACT, 1849.

Estate of

(Residence
and Date.)

SIR,

THE applications I have made for payment of £
appearing by the bankrupt's books and statements to be due by you to
this estate, having failed to produce a settlement, I have now to inform
you, that if this sum be not paid on or before the
it will be my duty to apply for a summons to bring you before the Court
to be examined on oath, and that you will be liable to the costs of this
proceeding.

I am, Sir,

Your obedient Servant,

Official Assignee.

No. 24.

Letters to Creditors for Particulars of Demand, &c.

Estate of

Bankrupt.

(Residence
and Date.)

SIR,

I REQUEST you will immediately favour me with a statement of your account with the above bankrupt; and the particulars of any bills, notes, deeds, goods, or other securities in your possession.

I remain, Sir,

Your obedient Servant,

Official Assignee.

Form of Affidavit by Creditor of Loss of Bill of Exchange.

maketh oath, and saith, that ha made a careful search for the bill
of exchange, the particulars whereof are under-written, and which ha
been proved under this estate by but that
th deponent ha not been able to find the same, and verily
believe that the same ha been lost or mislaid; and th deponent
further saith, that ha not nor ha the said
or any person or persons to use, to this deponent's knowledge or
belief, negotiated the said bill or either of them, nor in any manner
parted with or assigned legal or beneficial interest in the said bill
of exchange, or any part thereof; and that deponent the person
now legally and beneficially interested in the same, and entitled to receive
for own use all dividends in respect thereof, and that all dividends
which have been paid or declared or monies received on account of or in
respect of said bill or either of them, or from any other security, do not
amount to twenty shillings in the pound, and that the dividend now pay-
able under the above estate and not yet received, will not make up twenty
shillings in the pound.

Bill above referred to.

Date.	Drawer.	Acceptor.	Sum.

Sworn before me at
this day of 18

Upon the abovenamed _____ signing the annexed
letter of indemnity, and giving security to the satisfaction of the official
assignee, I direct the dividend to be paid to _____

Commissioner.

No. 25—*continued*.

Estate of

Bankrupt.

SIR,

THE undermentioned bill proved by
 under this estate, having been lost or
 mislaid, and the following dividend having been declared thereon,
 but not yet paid ; viz.

and which dividend with all others already received, or which have
 been declared or become payable on or in respect of the said bill do not
 amount to 20s. in the pound thereon ; in consideration therefore of your
 paying to or to

order the dividend above mentioned
 hereby undertake to indemnify you against all claim of any other person
 to the said dividend, or any part thereof ; and from all loss, damage, and
 expense which you, or your executors or administrators, may sustain by
 reason of your making such payment to me ; and if it should hereafter
 appear that the said sum of £ or any part thereof,
 with the dividends already received or declared up to this day, exceed the
 amount of the bill hereby engage to repay the same to you, or to the
 assignee or assignees of the above estate with interest at the rate of
 5 per cent. per annum from this day. Dated at
 this

Bill above referred to

To Mr.

Official Assignee to the above estate.

CREDITORS' ASSIGNEE.

LAST EXAMINATION.

Day appointed for
 Adjourned to
 Passed or otherwise

CERTIFICATE.

Date of
 Class
 Refused or suspended
 For Special Conditions, Appeal,
 &c., see Remarks.

AUDIT.

Date of.....
 Amount in hand applicable }
 to dividend }

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No. of, or final
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 Rate.....
 Sum divided.....
 Surplus undivided

REMARKS and SPECIAL CIR- }
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